88- 1825

No. .....

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

—o—

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY, a corporation, and NATIONAL FIRE INSURANCE OF HARTFORD, a corporation, individually and as representatives of all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of November 21, 1978, and their transferees,

and

DAVID L. CAMPBELL and the ESTATE OF EDWARD W. FREDRICKSON,

Petitioners,

vs.

UNION ELECTRIC COMPANY, a corporation, and CENTERRE TRUST COMPANY, a corporation,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

—o—

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a private right of action in equity to enjoin violations of § 17(a) of the Securities Act of 1933.

2. Whether, in the face of Article VI, cl. 2 of the Constitution of the United States (the Supremacy Clause), the Missouri Supreme Court can set aside an injunction based on § 17(a) of the Securities Act of 1933 and § 323(a) of the Trust Indenture Act of 1939, enjoining the use of an undisclosed right to redeem bonds, and, in doing so, repudiate the holding of the United States Court of Appeals for the Eighth Circuit that such redemption right was obtained by the perpetration of a federal securities fraud on the bondholders in violation of all three subsections of S.E.C. Rule 10b-5.

3. Whether, in the face of the Supremacy Clause of the Constitution of the United States, the Missouri Supreme Court may refuse to apply the provisions of § 302 (a) and (b), § 315(e), and § 323(a) of the 1939 Act and § 17(a) of the 1933 Act so as to severely curtail the utilization of class actions to redress violations of the federal securities laws; and, so as to allow a judicially determined perpetrator of federal securities fraud the unfettered enjoyment of the benefits of its own wrongdoing contrary to the explicitly declared policy of the United States underlying the federal securities laws.

4. Whether the disenfranchisement by the Missouri Supreme Court of the members of a state court equity class on the grounds that a Rule 10b-5 damage award to a subsequently certified and differently defined federal class was an election of remedies by and an adequate remedy at

law for such state court equity class, and the consequent denial to them of a right to pursue injunctive relief under § 17(a) of the 1933 Act and § 323(a) of the 1939 Act for the prevention of prospective damages that will result from the exercise of an undisclosed bond redemption right (which was determined by the United States Court of Appeals for the Eighth Circuit to have been obtained through the perpetration of federal securities fraud), constitutes a denial of the freedom of petition, of free access to the courts, and of the due process of the law, in violation of the First and Fourteenth Amendments to the Constitution of the United States; and, in the case of those equity class members who opted-out of the federal damage class, also constitutes a violation of the Supremacy Clause of the Constitution of the United States as being a nullification of the federal opt-out procedure under Rule 26, F.R.C.P.

LISTING OF PARTIES

Petitioners are:

Harold Harris, an individual

Continental Casualty Company, a corporation

National Fire Insurance Company of Hartford, a corporation

A class of bondholders consisting of

all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of November 21, 1978, and their transferees,

David L. Campbell

The Estate of Edward W. Fredrickson

Respondents are:

Union Electric Company, a corporation

Centerre Trust Company, a corporation

Continental Casualty Company and National Fire Insurance Company of Hartford are subsidiaries of CNA Financial Corporation, which in turn is a subsidiary of Loewe's, Inc. Rules of the Supreme Court of the United States, Rule 28.1

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1. The Writ Should Be Granted Because The Opinion Violates Article VI, Clause 2, The Supremacy Clause, Of The Constitution Of The United States In That:

(a) The Opinion Repudiates And Ignores The Holdings Of The U.S. Court Of Appeals, Which Are The Established Law Of This Case, By Misapplying The State Common Law Rule Regarding Election Of Remedies And Misinterpreting The Common Law Rule Concerning The Effect Of An Adequate Remedy At Law On The Right To Equitable Relief, So As To Deny All Of The Class Members Their Right To Pursue Their Causes Of Action Under Federal Securities Laws In The State Courts (Where They Had A Clear Federally Established Right To Do So), And So As To Provide The Unconscionable Result That A Perpetrator Of Federal Securities Fraud Is Allowed To Reap The Full Benefits Of Its Fraud. 16

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(b) The Opinion Refuses To Enforce And Apply The Provisions Of § 302(a) And (b), § 315(c), And § 323(a) Of The Trust Indenture Act Of 1939, And § 17(a) Of The Securities Act Of 1933, And The Decisions And Interpretations Of The Federal Courts Concerning Said Federal Laws, So As To Severely Curtail The Utilization Of Class Actions To Redress Violations Of The Federal Securities Laws, Contrary To The Expressed Public Policy Underlying The Act, And So As To Provide The Unconscionable Result That A Perpetrator Of Federal Securities Fraud Is Allowed To Reap The Full Benefits Of Its Fraud. 21

2. The Writ Should Be Granted Because The Opinion Denies The Class Members Their Freedom Of Petition And Of Free Access To The Courts, And Due Process Of Law, In Violation Of The First And Fourteenth Amendments To The Constitution Of The United States, And Nullifies The Federal Opt-Out Procedure In Class Actions In Violation Of The Supremacy Clause Of The Constitution Of The United States. 26

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In The

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October Term, 1988

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY, a corporation, and NATIONAL FIRE INSURANCE OF HARTFORD, a corporation, individually and as representatives of all of the holders of the $70,000,000 first mortgage bonds of Union Electric Company, 10½% Series due March 1, 2005, as of November 21, 1978, and their transferees,

and

DAVID L. CAMPBELL and the ESTATE OF EDWARD W. FREDRICKSON,

Petitioners,

vs.

UNION ELECTRIC COMPANY, a corporation, and CENTERRE TRUST COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners respectfully pray that a Writ of Certiorari be issued to review the opinion and judgment of the Supreme Court of Missouri entered on February 14, 1989, modified on the Court's own motion on March 14, 1989, and Motion for Rehearing denied on March 14, 1989.

OPINION AND JUDGMENT BELOW

The opinion, which is reported at 766 S.W.2d 80, and the judgment of the Supreme Court of Missouri, appear

in Appendices A and B hereto. The judgment of the Circuit Court of the County of St. Louis, Missouri appears in Appendices D and E hereto.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Missouri was entered on February 14, 1989, and modified on the Court's own motion on March 14, 1989. [App. B]. A timely motion for rehearing was denied on March 14, 1989. [App. G]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, cl. 2 of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment One to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment Fourteen, Section 1, to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 17(a) of the Securities Act of 1933 [*15 U.S.C. § 77q*] *provides:*

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

§ 302(a)(5) of the Trust Indenture Act of 1939 [*15 U.S.C. § 77eee(a)(5)*] *provides:*

(a) Upon the basis of facts disclosed by the reports of the Securities and Exchange Commission made to the Congress pursuant to section 78jj of this title and otherwise disclosed and ascertained, it is hereby declared that the national public interest and the interest of investors in notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, which are offered to the public, are adversely affected—

(5) when the indenture contains provisions which are misleading or deceptive, or when full and fair disclosure is not made to prospective investors of the effect of important indenture provisions;

§ 302(b) of the Trust Indenture Act of 1939 [*15 U.S.C. § 77eee(b)*] *provides:*

> (b) Practices of the character above enumerated have existed to such an extent that, unless regulated, the public offering of notes, bonds, debentures, evidences of indebtedness, and certificates of interest or participation therein, by the use of means and instruments of transportation and communication in interstate commerce and of the mails, is injurious to the capital markets, to investors, and to the general public; and it is hereby declared to be the policy of this subchapter, in accordance with which policy all the provisions of this subchapter shall be interpreted, to meet the problems and eliminate the practices, enumerated in this section, connected with such public offerings.

§ 315(e) of the Trust Indenture Act of 1939 [*15 U.S.C. § 77ooo(e)*] *provides:*

> (e) The indenture to be qualified may contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorney's fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant: Provided, That the provisions of this subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any of the payment of the principal or interest on any indenture security, on or after the respective due dates expressed in such indenture.

323(a) of the Trust Indenture Act of 1939 [15 U.S.C. § 77www] provides:

> (a) Any person who shall make or cause to be made any statement in any application, report, or document filed with the Commission pursuant to any provisions of this subchapter, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who shall omit to state any material fact required to be stated therein or necessary to make the statements contained therein not misleading, shall be liable to any person (not knowing that such statement was false or misleading or of such omission) who, in reliance upon such statement or omission, shall have purchased or sold a security issued under the indenture to which such application, report or document relates, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such a statement was false or misleading or of such omission. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense. No action shall be maintained to enforce liability created under this section unless brought within one year after the discovery of the facts contituting the cause of action and within three years after such cause of action accrued.

———o———

STATEMENT OF THE CASE

This is an equity class action on behalf of the holders of Union Electric Company's ("UE") $70,000,000 first mortgage bonds, 10½%, Series due March 1, 2005 ("Series

2005 Bonds"), as of November 21, 1978, and their transferees.

In March, 1975, UE issued its Series 2005 Bonds, and sold the Bonds to a syndicate of Underwriters, who offered the Bonds to the public. [App. H, 787 F.2d at 359]. The purchasers and UE both intended that the Bonds would possess solid protection against call. [*Id.*, at 364, 365]. The prospectus was interpreted as prohibiting UE from refunding the Series 2005 Bonds for ten years at a lower interest rate [*Id.*, at 365], and as providing additional protection against call in the form of a premium price list [*Id.*]. The Bonds were marketed as possessing solid protection against call for ten years. [*Id.*].

On April 11, 1987, UE publically announced its plan to call $50,000,000 of the Series 2005 Bonds [*Id.*, at 359]. The monies for the redemption plan were provided by short-term borrowings by UE at a lower interest rate, and were ultimately to be provided by a private replacement of a long-term mortgage bond issue at 9.35%. [*Id.*, at 359-60]. UE deposited $49,887,000 with its mortgage trustee, Centerre Trust Company, placing $49,187,000 in its Maintenance Fund and $700,000 in its Improvement Fund for the Series 2005 Bonds. [*Id.*]

This action was instituted on May 9, 1978 in the Circuit Court of St. Louis County, Missouri against UE and Centerre seeking declaratory and injunctive relief. [*Id.*, at 360]. Consequently, on June 19, 1978, UE abandoned its redemption plan. [*Id.*] On November 21, 1978, the equity action was certified as a class action and the class defined as the holders of the Series 2005 Bonds as of that date, and their transferees. [App. A, A-5] In December, 1979, the Circuit Court granted plaintiffs' motion for summary judgment. [*Id.*, A-6] The Missouri Court of Appeals reversed, construing the bond contract to allow UE

to call the Series 2005 Bonds at par under Article VIII, § 8 of the original indenture, using cash in the Maintenance Fund. *Harris, et al. v. Union Electric Co.*, 622 S.W.2d 239, 241-50 (Mo.App. 1981) [*Harris I*].

On February 10, 1980, plaintiffs, individually and on behalf of a class of bondholders, instituted suit in the U.S. District Court for the Eastern District of Missouri against UE [App. H, 787 F.2d at 360], alleging violations of S.E.C. Rule 10b-5 with respect to the issuance and proposed call of the Series 2005 Bonds [*Id.*]. The District Court certified the class as to the 10b-5 damage claims only, pursuant to Rule 23(b)(3), F.R.C.P., ultimately defining the class as the holders of the Series 2005 Bonds as of the public announcement by UE on April 11, 1978. [*Id.*]. After opt-outs, the class consisted of 1,500 persons holding 67,906 bonds of $1,000 par value each. [*Id.*] After a bifurcated trial on the issues of liability and damages, the jury returned verdicts in favor of the plaintiffs, resulting in a judgment in their favor against UE in the sum of $2,716,240. [*Id.*] The district court dismissed the plaintiffs' 10b-5 equitable claims without prejudice, and plaintiffs' voluntarily dismissed their non-10b-5 claims without prejudice. [App. A, A-16, n.11].

On appeal, the U.S. Court of Appeals for the 8th Circuit affirmed at 787 F.2d 355 [*Harris III*] [App. H], holding "that the evidence is sufficient for the jury to have found that UE's entire course of conduct from March, 1975 to April, 1978 concerning the Series 2005 Bonds constituted a course of business and scheme or artifice which operates as a fraud on the bondholders." [*Id.*, at 362]. The Court repeated this observation three more times. [*Id.*, at 366, 369, 370]. The Court further held that "it is clear that the jury could have reasonably found the pro-

spectus is ambiguous and misleading in that it omits material facts concerning the call protection." [*Id.*, at 364]. The Court went on to explain the ambiguous and misleading provisions to which it was referring:

> Article VIII, section 8 of the bond contract has been judicially construed by the Missouri Court of Appeals to authorize lower cost refunding at the special redemption prices. *Harris v. Union Electric Co.*, 622 S.W.2d at 251. The prospectus, however, does not mention Article VIII, section 8. The prospectus is misleading in that it does not adequately disclose the authorization set forth in section 8, while giving the impression that refunding the bonds at a lower rate of interest before March 1, 1985 is prohibited. The redemption provision on page twenty-eight of the prospectus prohibits lower cost refunding at the Regular Redemption Prices, and the bond contract allows such refunding at the Special Redemption Price. This "protection" is a sham. The Regular Redemption Prices are premiums, but the Special Redemption Price is fixed at par. A restriction on lower cost refunding at a premium with no such restriction at par affords no meaningful protection against call. UE would never call the bonds at a premium if it could call them at the lower price of par. This renders the premium price list on page twenty-eight of the prospectus meaningless and misleading, since it represents prices that would never be paid. Finally, the prospectus is misleading in that it fails to disclose UE's right to directly call the bonds through the Maintenance Fund. The bond contract, however, has been judicially construed to provide UE with such a right. Yet, the Maintenance Fund provision on page twenty-nine of the prospectus indicates that funds deposited in the Maintenance Fund may be used indirectly to redeem bonds by first transferring the money to the Improvement Fund. This distinction is important because had UE redeemed the bonds indirectly through the Maintenance Fund according to the provisions on page twenty-nine, it could not have avoided paying the pre-

> mium prices. The jury reasonably could have found that the prospectus is misleading and ambiguous in that it omits material facts that would have adequately disclosed the call protection of the bonds." [*Id.*, at 364-5].

The court found that UE's conduct with respect to the Series 2005 Bonds violated all three subparagraphs of Rule 10b-5, holding [*Id.*, at 365-6]:

> . . . we conclude that the plaintiffs produced sufficient evidence for the jury to have found that the prospectus is ambiguous and misleading in that it omitted material facts that would have adequately disclosed UE's right to call the bonds, in violation of Rule 10b-5(b). We also conclude that the evidence is sufficient for the jury to have found that these omissions were part of a larger scheme or course of business to defraud the bondholders. To knowingly implement a plan in 1978 to call bonds that were previously intended and marketed as having solid call protection until 1985, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders in violation of Rule 10b-5(a) and (c).

The Court further found that UE's conduct caused plaintiffs' damages, which were "best measured by the difference between the purchase price of the bonds and their true value on the date purchased." [*Id.*, at 368].

This Court denied certiorari at 102 S.Ct. 94 (1986).

In the meantime, after remand by the Missouri Court of Appeals, the Circuit Court, after a three day evidentiary hearing, entered its order granting Petitioners Campbell and Fredrickson attorneys' fees of $646,000 and expenses of $23,937.39. [App. E, A-69]. The Circuit Court based its fee and expense award on a provision in the bond contract, as well as on general equitable principles. [*Id.*, A-68, A-69]. UE's appeal to the Missouri Court of Ap-

peals was dismissed as premature.[1] *Harris, et al. v. Union Electric Co.*, 685 S.W.2d 607 (Mo.App. 1985) [*Harris II*].

Following the disposition of the federal appeal, the plaintiffs moved for summary judgment on their equity claims, based on the facts established in *Harris III*, under the principles of collateral estoppel. [App. A, A-12). The St. Louis County Circuit Court entered its summary judgment, finding that UE's redemption plan utilizing Article VIII, § 8 of its original indenture constituted "fraud and deceit, and constituted a violation of § 17(a) of the 1933 Act and § 323(a) of the 1939 Act." [App. D, A-58]. The Circuit Court's order permanently enjoined UE from utilizing the Article VIII, § 8 redemption device to circumvent the premium price list to redeem Series 2005 Bonds.[2] [App. D, A-59, A-60]. The order also reaffirmed the November 1, 1982 fee and expense award, granted interest thereon from that date, and granted a request for supplemental fees. [App. D, A-60]. On appeal, the Missouri Court of Appeals affirmed, relying on the holdings of the 8th Circuit in *Harris III* [App. C], and declining to address the securities fraud issues under the 1933 Act and the 1939

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1. The Missouri Supreme Court states that the Court of Appeals "found the fee award faulty on two grounds: first, plaintiffs received no tangible recovery, and second, Union Electric was granted a summary judgment in *Harris I*." [App. A, A-7]. This is untrue. The Court of Appeals made no such findings, holding that "[t]he propriety and amount of the award of attorneys' fees and expenses shall abide the final disposition of all issues as to all parties to this case . . ." 685 S.W.2d at 611.

2. The Missouri Supreme Court states that the injunction prohibits UE "from redeeming or attempting to redeem the bonds at a redemption price other than at the premium price listed on the bonds." This is not true. The effect of the injunction is merely to prohibit the use of the fraudulently obtained undisclosed Article VIII, § 8 redemption device, and Improvement Fund redemptions at par are still permitted. [App. C, A-59, A-60].

Act since it had found that "plaintiffs made a case for injunctive relief under a theory of common law fraud." [App. C, A-46]. On transfer, the Missouri Supreme Court reversed, holding that Petitioners' contention (based on *Harris III*) that UE obtained the Article VIII, § 8 redemption device through fraud was "without merit" [App. A, A-19]; holding that the prosecution to final judgment of their claims for damages by the federal class (holders of 67,906 bonds as of 4-11-78) constituted an election of remedies by and an adequate remedy at law for the state court equity class (holders of 70,000 bonds as of 11-21-78 and their transferees) [*Id.*]; and holding that members of the state court equity class who had opted-out of the federal class were not entitled to injunctive relief because the 10-year prohibition against lower interest cost refunding had expired [App. A, A-22]. The Missouri Supreme Court did not consider the fact that the injunction did not in any way address the issue of lower interest cost refunding, but solely prohibited the use of the fraudulently obtained undisclosed Article VIII, § 8 redemption device to circumvent the premium price list to redeem Bonds.

Petitioners filed a timely motion for rehearing, raising the issue of whether the Missouri Supreme Court violated the Supremacy Clause of the Constitution of the United States [App. F, A-78-80], and whether the disenfranchisement of the federal class members violated the First and Fourteenth Amendments to the Constitution of the United States [App. F, A-80], as well as the Supremacy Clause [*Id.*].

The motions for rehearing were denied on March 14, 1989, the Court modifying its opinion on its own motion. [App. G]. The modification consisted of eliminating footnote 11 (A-16), and renumbering the subsequent footnotes accordingly. This Petition for Writ of Certiorari, having

been filed within 90 days thereafter, is timely. 28 U.S.C. § 2101(c).

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REASONS FOR GRANTING THE WRIT

Rule 17 of the Rules of the Supreme Court of the United States sets forth three considerations indicating the character of reasons why review on writ of certiorari will be granted:

> (1) When there is a conflict between the decisions of federal courts or appeals on the same matter. Rule 17(a).
>
> (2) When a state court of last resort has decided a federal question in a way in conflict with the decision of a federal court of appeals. Rule 17(b).
>
> (3) When a state court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, or decided a federal question in a way in conflict with applicable decisions of the Supreme Court. Rule 17(c).
>
> All three considerations are present here.

First: The lower court injunction prohibiting UE's use of the undisclosed, fraudulently obtained Article VIII, § 8 redemption right was predicated, inter alia, on § 17(a) of the Securities Act of 1933. At issue, therefore, is whether there is a private right of action for injunctive relief under § 17(a). To Petitioners' knowledge, this is an issue heretofore undecided by a federal appellate court, although there is no question that the federal courts of appeals are divided on the existence of an implied private right of action for damages under § 17(a). This Court has declined to resolve that dispute on at least five occasions. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 304, n.9 (1985); *Herman & Maclean v. Huddleston*, 453 U.S. 375, 378, n.2 (1983); *Aaron v. U.S.*, 446 U.S. 680, 689 (1980); *International Board of Teamsters v.*

Daniel, 439 U.S. 551, 557, n.9 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733, n.6 (1975). During this period, two circuits which had implied a private right of action for damages under § 17(a), *Newman v. Prior*, 518 F.2d 97, 99 (4th Cir. 1975), *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 815 (9th Cir. 1981), have reversed themselves so as to deny such an action, *Newcome v. Esrey*, 862 F.2d 1099 (4th Cir. 1988), *Washington Public Power Supply System Securities Litigation*, 823 F.2d 780 (9th Cir. 1987) (en banc). As of now, the 4th, 5th, 8th, 9th and 11th Circuits refuse to imply the existence of a private right of action under § 17(a), *Newcome v. Esrey*, 862 F.2d 1099 (4th Cir. 1988), *Landry v. All American Assurance Co.*, 688 F.2d 381 (5th Cir. 1982), *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 328 (8th Cir. 1986), *Washington Public Power Supply System Securities Litigation*, 823 F.2d 780 (9th Cir. 1987) (en banc), *Currie v. Cayman Resources Corp.*, 835 F.2d 780 (11th Cir. 1988), while the 2nd and 7th Circuits remain on record as recognizing such a right, *Kirschner v. U.S.*, 603 F.2d 234, 241 (2nd Cir. 1978), cert. den. 442 U.S. 909 (1979), *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287, 1293 (7th Cir. 1975), cert. den. 425 U.S. 943 (1976).

The legislative history of § 17(a) indicates that Congress did indeed anticipate and intend that the "enforcement of the provisions of the new subsection is left to injunction . . ." 78 Cong. Rec. 8711-12 (1934), quoted in *Landry*, 688 F.2d at 389-90. In *Newcome*, while reversing its prior position and denying the existence of a private action for damages under § 17(a), the 4th Circuit noted that "from the beginning the drafters viewed § 17(a) as a general proscription to be enforced by . . . injunctive action . . ." 862 F.2d at 1105. "There is unanimity among

the commentators that § 17(a)(2) of the 1933 Act—indeed the whole of 17—was intended only to afford a basis for injunctive relief . . ." *Id.*, at 1104, n.9.

Petitioners submit that the existence of a private right of action in equity for injunctive relief to enforce the provisions of § 17(a) satisfies all three (3) requirements set by this Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 2088 (1975), and should be recognized by this Court.

Second: The Opinion of the Missouri Supreme Court is in direct conflict with the holdings of the U.S. Court of Appeals for the 8th Circuit in *Harris III*. In *Harris III*, the Court held that "UE's activities between March of 1975 and June of 1978 constituted a scheme or course of business that operated as a fraud upon the bondholders. "[787 F.2d at 369]. The Missouri Supreme Court rejects this holding as "without merit." [A-19]. In setting aside the injunction, the decision refuses to enforce the provisions of § 17(a) of the 1933 Act and § 323(a) of the 1939 Act on which it was based; and, in direct opposition to the express national policies underlying the federal securities laws, such as in § 302(a)(5) and (b) of the 1939 Act, permits UE, which has been judicially determined to have perpetrated federal securities fraud, to enjoy the fruits of its own wrongdoing.

Third: The decision disenfranchises those class numbers who participated in the federal damage class by holding that by suing for damages for fraud in the inducement of the contract to purchase the Bonds, they made an election of remedies which barred them from seeking injunctive to prevent UE from being able to effectively nullify the premium price list provided for in the bond contract. In doing so, the decision also runs afoul of the holding in *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781,

790-1 (5th Cir. 1973), after remand, 569 F.2d 251 (1978), cert. den. 439 U.S. 859, 99 S.Ct. 177, and *Bankers Trust Co. v. Pacific Employees Ins. Co.*, 282 F.2d 106, 110 (9th Cir. 1960), both of which hold that an action to recover damages for fraud in the inducement of a contract may exist at the same time as a suit on or to enforce the contract, and the one is not a bar to the other.

The decision mischaracterizes the injunction as applying to the question of lower interest cost refunding, ignoring the fact that the injunction merely prohibits the use of the fraudulently obtained undisclosed Article VIII, § 8 redemption device to circumvent the premium price list to redeem Bonds.

Based on its irrelevant finding that the issue of lower interest cost refunding was moot, and eschewing any discussion of the future damage to bondholders in the form of lost premium price and loss of the higher coupon rate that they would suffer should UE use the undisclosed Article VIII, § 8 redemption device to redeem their bonds, or the merits of their federal securities laws claims, the decision disenfranchises the federal opt-outs.

Finally, the decision refuses to apply the attorneys' fees provision of the bond contract. The bond contract provision is based on § 315(e) of the 1939 Act, the language of which it employs virtually verbatum. § 315(e) provides that an indenture may include a provision for costs and reasonable attorneys' fees "in any suit for the enforcement of any right or remedy" under the indenture; and the bond contract so provides. § 315(e) also provides that its provisions are not applicable to suits "instituted by any . . . group of indenture security holders, holding in the aggregate more than 10 percent in principal amount of the indenture securities outstanding." The bond con-

tract contains an identical indenture provision as to the Bonds. Ignoring the word "instituted", the decision refuses to apply the bond contract provision to this case because it is a class action, and, albeit brought by the holders of less than 10% of the bonds outstanding, is maintained on behalf of a class "representing more than 90 percent of the bonds outstanding." [App. A, A-25].

In each of these respects the decision violates the Supremacy Clause of the Constitution of the United States. In disenfranchising the federal class numbers, the decision also denies them the freedom of petition, the free access to the Courts, and due process of law, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

1. The Writ Should Be Granted Because The Opinion Violates Article VI, Clause 2, The Supremacy Clause, Of The Constitution Of The United States In That:

(a) The Opinion Repudiates And Ignores The Holdings Of The U.S. Court Of Appeals, Which Are The Established Law Of This Case, By Misapplying The State Common Law Rule Regarding Election Of Remedies And Misinterpreting The Common Law Rule Concerning The Effect Of An Adequate Remedy At Law On The Right To Equitable Relief, So As To Deny All Of The Class Members Their Right To Pursue Their Causes Of Action Under Federal Securities Laws In The State Courts (Where They Had A Clear Federally Established Right To Do So), And So As To Provide The Unconscionable Result That A Perpetrator Of Federal Securities Fraud Is Allowed To Reap The Full Benefits Of Its Fraud.

The 8th Circuit held in *Harris III* that "we view UE's entire conduct from March, 1975 to April, 1978 as a course of business and a scheme or artifice to defraud the investors, which includes the misleading call-protection provisions in the prospectus." [App. H, 787 F.2d at 370]. The

decision repudiates this holding, characterizing the contention that UE obtained the undisclosed Article VIII, § 8 redemption device through fraud as being "without merit." [A-19]. The decision also holds, without citation of authority, that the Petitioner Class is prohibited from suggesting that Union Electric would be acting wrongfully if it now exercised the fraudulently obtained undisclosed Article VIII, § 8 redemption rights.

In order to be able to reach such conclusions, the Court attempts to create the impression that *Harris I* judicially determined that Union Electric could redeem the bonds in the fashion that it attempted. The truth of the matter is that *Harris I* merely found that the bond contract included a redemption right under Article VIII, § 8, as UE contended. *Harris I* made no ruling, and in fact specifically refrained from making any ruling, to the effect that Union Electric could in fact redeem the bonds in the face of the fraud and prospectus disclosure issues that remained to be decided. The Missouri Court of Appeals specifically noted that "the Prospectus and disclosure issues are not properly before us." 622 S.W.2d at 251-2, n.7. *Harris I* emphasized "that our determination of the redemption features under the bond contract has not taken into consideration the Prospectus applicable to the Series 2005 Bonds . . ." 622 S.W.2d at 251-2. And, it was this Prospectus and Article VIII, § 8 redemption device which were the subject of the federal action, *Harris III*, 787 F.2d at 360, and which the 8th Circuit found to be fraudulent, *Id.*, at 364, 369, and 370.

In so misinterpreting *Harris I*, and inherently rejecting and repudiating the holdings of the U.S. Court of Appeals in *Harris III*, which are the established law of this case, the decision violates Article VI, clause 2 of the Constitution of the United States (the Supremacy Clause).

In *Sola Electric v. Jefferson Electric,* 317 U.S. 173, 63 S.Ct. 172, 173 (1941), this Court held that:

> It is a familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules.

Accordingly, the pronouncements of the federal courts on matters of federal law are binding on the state judiciaries. *Id.* In *Krause v. Lowden,* 109 P.2d 138, 143 (Kan. 1941), the Court recognized that "as to federal statutes the interpretations placed upon them by federal courts . . . is controlling upon state courts." *See, also, Ritchie v. Johnson,* 144 P.2d 925, 935 (Kan. 1944). It is well recognized that "state courts have a constitutional duty to enforce federal substantive rights in the state forum", *Terry v. Kolski,* 254 N.W.2d 704 (Wisc. 1977); *Grand Canyon Airlines, Inc. v. Arizona Aviation, Inc.,* 469 P.2d 486 (Ariz. App. 1970); and "are bound to give effect to federal law, and to disregard state law when there is a conflict", *Society National Bank v. Kiensk,* 463 N.E.2d 1261, 1264 (Ohio App. 1983); *State v. Superior Court of Marion County,* 151 N.E.2d 508 (Ind. 1058). In *U.S. ex rel. Lawrence v. Woods,* 432 F.2d 1072, 1075 (7th Cir. 1970), cert. den. 402 U.S. 983, 91 S.Ct. 1658, the Court held that ". . . in a given factual setting when a lower federal court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and its judgment is binding on all other courts, subject only to the appellate process."

The holding in *Harris III,* clearly establishes that Union Electric obtained the Article VIII, § 8 redemption right through fraud, 787 F.2d at 364, 365-6, and that Union Electric would be acting wrongfully if it now exercised the fraudulently obtained undisclosed Article VIII, § 8 redemption rights, *Id.*, at 366, 369, 370. In so doing, *Harris III* established all of the elements of liability under § 17(a)

of the 1933 Act and § 323(a) of the 1939 Act as well. As such, the Supreme Court of Missouri was mandated to abide by the holdings in *Harris III,* and to affirm the injunction on the authority of those two federal statutes. Nevertheless, the decision, eschewing the doctrine noted in *Sola Electric,* supra, 63 S.Ct. at 173, set up two common law rules to "set at naught" § 17(a) of the 1933 Act and § 323(a) of the 1939 Act, and to deny their benefits to the Petitioner class: a misapplication of the doctrine of election of remedies, and an unsupportable finding that the state equity class was adequately compensated by the federal damage judgment.

The two prerequisites to the application of the doctrine of election of remedies are the presence of inconsistent and repugnant remedies, and the prevention of double recovery, *Twin City Federal Sav. & Loan Ass'n v. Transamerica Ins. Co.,* 491 F.2d 1122 (8th Cir. 1974). The pursuit of consistent remedies alternately to achieve a lawful end does not constitute an election of remedies. *Sonken-Galambria Corp. v. Butler Iron & Steel Co.,* 119 F.2d 283, 287 (8th Cir. 1941).

A comparison of the federal case and of the instant action reveals that the actions are neither inconsistent with nor repugnant to one another, and that no double recovery is afforded to the plaintiffs.

The federal case concerned damages for fraudulent inducement to enter into the bond contract. The measure of damages was the benefit of the bargain theory. *Harris III,* 787 F.2d at 367-8. On the other hand, the instant action in equity is on the contract. Plaintiffs seek to prevent UE from circumventing the premium price list, which has always been a part of the bond contract. It is provided for in the 1975 Supplemental Indenture, and on the re-

verse of the bond certificate (itself created by and provided for in the Indentures, *Harris I,* 622 S.W.2d at 248). The plaintiffs seek nothing more than the benefit of their bargain as represented by the existence of a meaningful premium price list. And that is all that the injunction does—it eliminates the use of the only means available for circumventing the premium prices—the fraudulently obtained undisclosed Article VIII, § 8 redemption right.

An analysis of the two actions as to the nature of the injury redressed also shows not only that the doctrine of election remedies is inappropriate, but also that the federal damage judgment did not constitute an adequate remedy at law for the Petitioner class. The only monetary damages that had occurred at the time of the federal action was the fact that the bondholders had paid more for the bonds than they were worth. The bonds had not been redeemed, so the bondholders had not yet been deprived of the premium on the bonds nor had they been deprived of the benefit of a higher coupon rate as contrasted to the lower refunding rate. The Missouri Supreme Court states that "if Union Electric were to redeem the bonds presently, there can be no additional injury for which the federal plaintiffs have not already been compensated." [App. A, A-18]. This is obviously not true. The federal class could not have pursued remedies addressing the difference in value damage [the subject of the federal action] and at the same time have pursued remedies addressing the damages caused by the redemption itself [the subject of the instant equity action], for the simple reason that the 8th Circuit held that nothing that might occur after the announcement date of April 11, 1978 was relevant or material or could be taken into account with respect to the ascertainment of plaintiffs' damages. *Harris III,* 787 F.2d at 371-2.

Federal case law also makes it clear that the federal action for damages for fraudulent inducement is not inconsistent with or repugnant to the present equity action on the contract.

In *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781, 790-1 (5th Cir. 1973), after remand, 569 F.2d 251 (1978), cert. den. 439 U.S. 859, 99 S.Ct. 177, the court held that the plaintiff could recover damages for fraud in the inducement of the contract and at the same time maintain an action on the contract. The Court said: "A right of action on a contract and for fraud in inducing plaintiff to enter into such contract may exist at the same time, and a recovery of one of the causes will not bar a subsequent action on the other." *Id., Accord, Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 110 (9th Cir. 1960).

The instant decision flies in the face of the holding in *Sola Electric*, supra. It attempts to nullify the clear holdings of *Harris III* by misapplying the doctrine of election of remedies. That misapplication itself is contrary to the pronouncements of the federal courts. *Fredonia Broadcasting Corp. v. RCA Corp.*, supra; *Bankers Trust Co. v. Pacific Employers Ins. Co.*, supra. In repudiating the holding in *Harris III* and sanctioning UE's unfettered use of the fraudulently obtained undisclosed Article VIII, § 8 redemption device, the decision clearly violates the Supremacy Clause.

(b) The Opinion Refuses To Enforce And Apply The Provisions Of § 302(a) And (b), § 315(e), And § 323(a) Of The Trust Indenture Act Of 1939, And § 17(a) Of The Securities Act Of 1933, And The Decisions And Interpretations Of The Federal Courts Concerning Said Federal Laws, So As To Severely Curtail The Utilization Of Class Actions To Redress Vio-

lations Of The Federal Securities Laws, Contrary To The Expressed Public Policy Underlying The Act, And So As To Provide The Unconscionable Result That A Person Determined To Have Committed Federal Securities Fraud Is Allowed To Reap The Full Benefits Of Its Fraud.

It has already been noted that the Missouri Supreme Court is bound by the provisions of federal substantive law and the pronouncements of the federal courts on matters of federal substantive law. *U.S. Const.*, Art. VI, cl. 2; *Sola Electric v. Jefferson Electric*, 317 U.S. 173, 63 S.Ct. 172, 173 (1941); *U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970), cert. den. 402 U.S. 983, 91 S.Ct. 1658.

It is a matter of federal substantive law that the purpose of the securities laws of the United States (of which the 1933 Act and the 1939 Act are two), is to protect investors and to substitute a philosophy of full disclosure for the philosophy of "buyer beware", and to thus achieve a high standard of business ethics in the securities industry. *Affiliated Ute Citizens v. U.S.*, 406 U.S. 128, 92 S.Ct. 1456, 1471 (1972); *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180, 84 S.Ct. 275, 280 (1963); *Aaron v. S.E.C.*, 446 U.S. 680, 100 S.Ct. 1945 (1980). As a result, the federal securities laws are to be liberally construed and enforced and not to be taken in a technical or restrictive sense, so as to effectuate their broad remedial purpose. *Id.* These broad remedial federal policies are set forth, *inter alia*, in § 302 of the Trust Indenture Act of 1939:

> (a) . . . the national public interest and the interest of investors in . . . bonds . . . which are offered to the public, are adversely affected—
>
> (5) when the indenture contains provisions which are misleading or deceptive, or when full and fair disclosure is not made to prospective investors of the effect of important indenture provisions . . .

§ 302(b) further provides that it is the declared policy of the 1939 Act to meet the problems enumerated in § 302(a), and to eliminate such practices.

§ 323(a) of the 1939 Act is the anti-fraud section. It prohibits essentially the same practices as does Rule 10b-5, the subject of the federal litigation. The language of Rule 10b-5 is borrowed from § 17(a) of the 1933 Act and is virtually identical to it, *S.E.C. v. Texas Gulf Sulpher Co.*, 401 F.2d 833 (2d Cir. 1968), cert. den., 394 U.S. 976, so that the same can be said of § 17(a). The provisions of § 302(a) and (b), and of 323(a) of the 1939 Act, and of § 17(a) of the 1933 Act are matters of declared national policy, and are binding on the states. *U.S. Const.*, Art. VI, cl. 2; *Sola Electric v. Jefferson Electric,* supra; *U.S. ex rel. Lawrence v. Woods,* supra.

The injunction in this case was predicated, inter alia, on § 17(a) of the 1933 Act and on § 323(a) of the 1939 Act. All of the elements establishing liability under those two sections of the federal securities laws were established by the holding in *Harris III*. The injunction, insofar as it rests on either one of these two federal statutes, implements the holding of *Harris III* regarding the fraudulently obtained undisclosed Article VIII, § 8 redemption right and its effect on the premium price list. *Harris III* unequivocally held that the premium price list was rendered "meaningless and misleading" by the undisclosed Article VIII, § 8 redemption device. 787 F.2d at 364. The premium price list is contained in the indenture, as well as on the reverse of the bond certificate (which is created by and included in the terms of the indenture). Clearly, then the situation in *Harris III* specifically involves an "indenture [which] contains provisions which are misleading or deceptive" and where "full and fair disclosure is not made to prospective investors of the effect of important indenture pro-

visions", and falls squarely within the avowed policy of the 1939 Act to "eliminate" such practices. § 302(b), 15 U.S.C. 77bbb(b).

The decision, in allowing UE to utilize the fraudulently obtained undisclosed Article VIII, § 8 redemption right, overlooks these important declarations of federal law; and the fact that the injunction, resting on both § 17(a) of the 1933 Act and § 323(a) of the 1939 Act, is remedial in nature. *See, Affiliated Ute Citizens v. U.S.*, supra; *S.E.C. v. Capital Gains Research Bureau*, supra; *Aaron v. S.E.C.*, supra. In setting aside the injunction, the decision overlooks and fails to enforce the provisions of § 302(a) and (b), and § 323(a) of the 1939 Act, and § 17(a) of the 1933 Act, as well as the holding in *Harris III* as the established law of the case, thus violating the Supremacy Clause of the Constitution of the United States. *U.S. Const.*, Art. VI, cl. 2; *Sola Electric v. Jefferson Electric*, supra; *U.S. ex rel. Lawrence v. Woods*, supra.

These, however, are not the only provisions of federal law that the Missouri Supreme Court fails to enforce. The decision finds that the provisions of Article IX, § 12 of the Bond Contract do not apply in this case because "the present claim is not premised on rights or remedies provided by the indenture," and that the indenture provisions in question "expressly excluded authorization of attorneys' fees in a suit representing more than ten percent of the principal amount of bonds outstanding." [App. A, A-25]. In so holding, the decision fails to enforce the provisions of § 315(e) of the Trust Indenture Act. This statute makes it a matter of federal law that the benefit of the clause such as is found in Article IX, § 12 must be extended to a suit to enforce a right or remedy under the indenture, except when *instituted* by the holders of more than 10% of

the bonds outstanding. Neither reason given by the decision for its effective repudiation of § 315(e) has merit.

First, this suit clearly involves and is "premised on rights or remedies provided by the indenture." The 8th Circuit held that the fraudulently obtained undisclosed Article VIII, § 8 redemption device rendered the premium price list "misleading" and "meaningless." 787 F.2d at 364. The injunction merely prohibits Union Electric from utilizing the undisclosed Article VIII, § 8 redemption right that the 8th Circuit held that it had fraudulently acquired. The premium price list is part of the bond contract and is provided for in the 1975 Supplemental Indenture and on the reverse of the bond certificate (which itself is created by and provided for in the Indenture). Suffice it to say that the whole thrust of the injunction is to fashion complete relief for the plaintiffs—to give them the benefit of a premium price list that has always been part of the bond contract, to make it meaningful, and to prevent them from suffering the redemption damages (lost premium price and higher interest rate) which they were precluded from including in the federal action, and for which they have never been compensated. *Harris III,* 787 F.2d at 371-2.

Second, this suit was *instituted* by holders of less than 10% of the total of $70,000,0000 bonds outstanding. The decision recognizes that "plaintiff Harold Harris filed suit" [App. A, A-4], and that after Union Electric had abandoned its redemption plan, Continental Casualty Company and National Fire Insurance Company of Hartford came forward as bondholders, and "were added as named plaintiffs in the suit originally filed by Harris". [App. A, A-5]. The fact of the matter is that the suit was filed by Harold Harris, a holder of $12,000 bonds out of a total of $70,000,000 outstanding, and no one else. While it is true that he filed the case as a class action, it is axiomatic that

the class members did not truly become parties to the suit or bound by it until after the class determination order was entered on November 21, 1978, and a notice was sent in May, 1980. *See, Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2nd Cir. 1968), rev'd, 479 F.2d 1005 (2nd Cir. 1973), vacated and remanded, 417 U.S. 156, 94 S.Ct. 2140 (1974). Even if it could be said that the suit was also instituted by Continental Casualty Company and National Fire Insurance Company of Hartford (albeit they did not join as party plaintiffs until several months after the suit had been filed, or "instituted"), only $4,012,000 in bonds are represented by Harris and the two insurance companies, [App. H, 787 F.2d at 359] a percentage holding of approximately 5.73%.

The decision ignores the plain meaning of the words *instituted by* the holders of more than 10% of the bonds outstanding, and stretches them to embrace suits *representing* holders of more than 10% of the bonds outstanding. The word *instituted* must be given its plain and ordinary meaning, and cannot be stretched in the fashion that the decision would impose. *U.S. v. Jones,* 811 F.2d 444 (8th Cir. 1987). In stretching this statutory language to include this class action, the decision runs afoul of § 315(e) of the Trust Indenture Act of 1939, and thus violates the Supremacy Clause of the Constitution of the United States. *U.S. Const.,* Art. VI, cl. 2; *Sola Electric v. Jefferson Electric,* supra; *U.S. ex rel. Lawrence v. Woods,* supra.

2. The Opinion Denies The Class Members Their Freedom Of Petition And Of Free Access To The Courts, And Of Due Process, In Violation Of The First And Fourteenth Amendments To The Constitution Of The United States, And Nullifies The Federal Opt-Out Procedure In Class Actions In Violation Of The Supremacy Clause Of The Constitution Of The United States.

The decision purports to justify its disenfranchisement of the federal opt-outs by contending that their claims are moot. [App. A, A-22]. It attempts to give the impression that the fraud in the federal case was confined to the fact that inadequate disclosure of the Article VIII, § 8 redemption right created the illusion that refunding the bonds at a lower interest rate before March 1, 1985 was prohibited, and persistently ignores the significant role of the premium price list. See, *Harris III*, 787 F.2d at 364. In fact, there were two separate and distinct elements to the so-called call protection on the bonds; viz., the 10 year protection against lower interest cost refunding, and the premium price list. *Id.* The fraudulent inducement had four aspects to it, the first two of which apply to the "refunding" protection, and the latter two of which apply to the "premium prices". The Petitioner class makes no contention about, nor does the injunction address in any way, the first two areas of the fraud; namely, the false impression that lower interest cost refunding was prohibited, created by the inadequate disclosure of the Article VIII, § 8 redemption right, and the "sham" protection against refunding at the premium prices when there was no restriction against refunding at par. [App. H, 787 F.2d at 364]. Both of these aspects of the fraud deal solely with the refunding of the bonds prior to March 1, 1985, and are admittedly moot. The same is not true, however, of the remaining two areas of the fraud; viz., the "meaningless" and "misleading" premium price list, and the undisclosed right to directly call the bonds through the Maintenance Fund and thus circumvent the premium price list. [*Id.*]. It is these two areas of the fraud, both of which concern the payment of premium prices, that are addressed by the injunction. Unlike the issue of refunding, the effect of the premium price is an issue throughout the life of the bonds,

until their maturity, and is totally independent of the issue of lower interest cost refunding. The only issue addressed by the injunction is whether the plaintiffs are entitled to the benefit of the premium price list contained in the Bond Contract. The injunction assures the bondholders of this benefit by the simple expedient of enjoining the use of the only method available to circumvent it—the fraudulently obtained undisclosed Article VIII, § 8 redemption right.

It is clear, then, that the claims of the federal opt-outs are not moot. And, it goes without saying that these rights of the federal opt-outs must be protected. *Phillips Petroleum v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 2974 (1985). Each of these federal opt-outs were members of this state court class at the time they opted out of the federal class. They had also received notice of their inclusion in the state court class, so they must be presumed to have made the election to pursue their rights under, inter alia, § 17(a) of the 1933 Act and § 323(a) of the 1939 Act. There can be no question about the fact that these opt-outs, in fact all of the class members, possess a constitutionally protected right to pursue their § 17(a) and § 323(a) federal securities laws claims.

The First Amendment guarantees "the right of the people to petition the Government for redress of grievances." There is no question about the fact that "the right to petition extends to all departments of the government" and that "the right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 612 (1972); *DeJonge v. Oregon,* 299 U.S. 353, 57 S.Ct. 269 (1936).

Even prisoners enjoy better fare than the Missouri Supreme Court gives to these class members. *See, Cruz*

v. Beto, 405 U.S. 319, 92 S.Ct. 1079 (1972); *Dreyer v. Jarlet,* 349 F.Supp. 452, 484 (S.D.Tex. 1972), aff'd 479 F.2d 1044 (5th Cir. 1973); *Timmerman v. Brown,* 528 F.2d 811, 815 (4th Cir. 1975).

In disenfranchising these class members the Opinion denies them their freedom of petition and free access to the courts with respect to their federal securities act claims, as guaranteed by the First Amendment to the U.S. Constitution and the due process clause of the Fourteenth Amendment to the U.S. Constitution, and nullifies the federal class action "opt-out" procedure in violation of Article VI, clause 2, the Supremacy Clause, of the Constitution of the United States.

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CONCLUSION

This case presents significant issues of general interest and importance. The Petition should be granted and Certiorari issued to the Supreme Court of Missouri to review the issues of (i) whether there is a private right of action in equity to enjoin violations of § 17(a) of the 1933 Act; (ii) whether the Missouri Supreme Court's repudiation of and refusal to follow the decision of the 8th Circuit by allowing UE to exercise its undisclosed and fraudulently obtained bond redemption device violates the Supremacy Clause; (iii) whether the Missouri Supreme Court's refusal to apply and enforce the provisions of § 302(a) and (b), § 315(c) and § 323(a) of the 1939 Act and § 17(a) of the 1933 Act violates the Supremacy Clause; and (iv) whether the disenfranchisement of the state court equity class members, denies them the freedom of petition, free access to the courts, and the due process of the law, and in the case of the opt-outs from the federal damage class, violates the Supremacy Clause as well as being

a nullification ~~of the federal~~ opt-out procedure under Rule 26, F.R.C.P.

The manifest injustice of allowing this perpetrator of federal securities fraud (Union Electric) to enjoy the fruits of its own wrongdoing must be reversed. While the Missouri Supreme Court was apparently not hesitant to place its *imprimatur* on UE's fraudulent conduct, this Court should uphold the 8th Circuit's position and refuse to do so. The granting of the instant Petition and issuance of this Court's Writ of Certiorari to the Missouri Supreme Court is necessary in order to prevent the thwarting of the holdings of the U.S. Court of Appeals in *Harris III* and the manifest injustices of allowing the perpetrator of federal securities fraud to reap the benefits of its own wrongdoing.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MISSOURI
en banc

HAROLD HARRIS, et al.,	)	
	)	
Plaintiffs-Respondents,	)	
	)	
and	)	
	)	
DAVID L. CAMPBELL and ESTATE OF EDWARD W. FREDRICKSON,	)	
	)	
Petitioners-Respondents,	)	
	)	
and	)	
	)	
DAVID L. CAMPBELL,	)	No. 70374
	)	
Petitioner-Respondent,	)	
	)	
v.	)	
	)	
UNION ELECTRIC COMPANY,	)	
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
CENTERRE TRUST COMPANY, FORMERLY ST. LOUIS UNION TRUST COMPANY,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
Honorable James R. Hartenbach, Judge

(Filed Febr. 14, 1989)

This appeal is the fourth in a series of class action suits involving Union Electric Company and holders of its Series 2005 Bonds. The litigation spans the last decade and bears a complex procedural pedigree. In April, 1978, Union Electric announced that it planned to redeem approximately $50,000,000 of the $70,000,000 in Series 2005 Bonds originally issued in March, 1975. Believing the bonds were sold with solid "call protection" for ten years, several bondholders filed suit seeking declaratory, injunctive and monetary relief for a class of bondholders. As a result of the suit, Union Electric halted its redemption plan.

The present action is a consolidated appeal by defendants-appellants Union Electric Company and Centerre Trust Company. The trial court granted summary judgment in favor of the named plaintiffs and the class of bondholders they represent.[1] The order enjoined Union Electric from redeeming the Series 2005 bonds at par value from money deposited with its trustee, Centerre. The trial court also reaffirmed a prior award of attorneys' fees and expenses, plus interest to petitioners, David Campbell and the Estate of Edward W. Frederickson (plaintiffs' counsel) and awarded additional attorneys' fees to plaintiffs' counsel. The Court of Appeals, Eastern District, affirmed.

We granted transfer to consider whether a prior recovery of money damages in a class action bars subse-

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[1] The trial court designated its judgment final for purposes of appeal. *See Speck v. Union Electric Co.*, 731 S.W.2d 16 (Mo. bank 1987). Counts II and III of plaintiff's petition, consisting of damage claims for additional legal fees, expenses and punitive damages remain pending in the circuit court.

quent injunctive relief for a nearly identical class. We have jurisdiction. Mo. Const. art. V, § 10. Reversed and remanded with directions to enter summary judgment in favor of Union Electric and for such other proceedings as may be consistent with this opinion.

I. Procedural History

On March 19, 1975, Union Electric Company offered for sale $70,000,000 of its First Mortgage Bonds, 10 ½ Series due March 1, 2005. The bonds were issued under the terms of a supplemental indenture with Union Electric as grantor and St. Louis Union Trust Company (now Centerre Trust Company) as Trustee. The bonds had a par value of $1,000, and were sold by a syndicate of eighty-eight underwriters who offered the bonds to the public. By April 9, 1975, all of the bonds were sold. The named plaintiffs in this action were original purchasers of the bonds.[2]

Following the initial sale, the market values of the bonds fluctuated, adjusting for the rise and fall of interest rates. In late 1976, long-term bond yields began to fall. Utility companies, forced into the debt market in 1974 and 1975 in the face of soaring interest rates, were tempted to seek early retirement of their high-yield bonds through redemption or refunding. Union Electric began investi-

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2 Harold Harris purchased twelve bonds at 100 percent of par or a total price of $12,000. Continental Casualty Company purchased 1,000 bonds at a total price of $1,001,000. National Fire Insurance Company of Hartford purchased 3,000 bonds at a total price of $3,014,687.50. In their Third Amended Petition, the corporate plaintiffs indicate that they now hold only 5 bonds each.

gating the possibility of a redemption of its Series 2005 bonds.

On April 11, 1978, Union Electric publicly announced its plan to call $50,000,000 of its Series 2005 bonds. To implement its plan, Union Electric incurred nearly $50,000,000 in short-term debt at an interest rate below 10.6 percent. The cash was deposited with the mortgage trustee, Centerre Trust Company, and credited to Union Electric's Maintenance Fund and Improvement Fund. Union Electric intended to redeem the short-term debt by a private placement of a new long-term mortgage bond issue at an interest rate of 9.35 percent.

Union Electric directed its trustee to redeem the Series 2005 bonds at 100 percent of face value. Centerre refused to do so without judicial approval because it questioned the legality of the plan to call the bonds through the Maintenance Fund. On May 9, 1978, the plaintiffs instituted their state court action against Union Electric and Centerre. After learning of the pending lawsuit, the prospective purchasers of the replacement bonds refused to complete their purchase of the bonds. On June 19, 1978, Union Electric abandoned its redemption plan and withdrew the cash from the Maintenance Fund.

Harris I[3]

Within a month after Union Electric announced its redemption plan, plaintiff Harold Harris filed suit seeking

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[3] Our decision in this case relies in part on the law of the cases found in prior reported appellate decisions concerning this litigation. In the interest of brevity, these prior decisions will be referred to as *"Harris I"*, *Harris v. Union Electric Co.*, 622 S.W.2d 239 (Mo. App. 1981), *"Harris II"*, *Harris v. Union Electric Co.*, 685 S.W.2d 607 (Mo App. 1985); and *"Harris III"*, *Harris v. Union Electric*, 787 F.2d 355 (8th Cir.), *cert. denied*, 102 S.Ct. 94 (1986).

relief for himself and all other individuals holding the Series 2005 bonds. Harris maintained that the 1975 Indenture expressly precluded redemption of the bonds from funds obtained at an interest cost less than 10.6 percent for the first ten years, until March 1, 1985. Furthermore, Harris claimed that the Indenture prohibited redemptions from the Maintenance Fund and Improvement Fund, and, if the redemption was permitted, federal securities laws would be violated. In sum, Harris argued that bondholders like himself bought the bonds in reliance on solid call protection on the bonds for ten years.

Soon after Union Electric announced it had abandoned its redemption plan, Continental Casualty Company and National Fire Insurance Company of Hartford came forward as bondholders and were added as named plaintiffs in the suit originally filed by Harris. With the consent of the parties, the trial court certified the claims as a Rule 52.08(b)(1) and (b)(2) class action. The class was defined as all holders of the Series 2005 Bonds as of November 21, 1978 (the date of the certification order) and their transferees.

The plaintiffs' petition contained eleven counts. It sought a declaration of plaintiffs' rights under the indenture and an injunction prohibiting the redemption plan contemplated by Union Electric. Additionally, plaintiffs requested monetary damages on the basis of statutory and common law violations. The trial court severed the

plaintiffs' claims for declaratory and injunctive relief for separate trial.[4]

In their motion for summary judgment, plaintiffs argued that Union Electric was prohibited by the indenture from proceeding with the redemption plan. However, if Union Electric could redeem, plaintiffs argued that the selling prospectus failed to adequately disclose the redemption features of the Series 2005 bonds.

In December of 1979, the trial court granted the plaintiffs' motion for summary judgment.[5] The court held that Union Electric's redemption plan was not permitted under the terms of the indenture and issued an injunction prohibiting redemption on the terms proposed by Union Electric. The court did not address the prospectus disclosure issue.

On June 16, 1981, the Court of Appeals, Eastern District, reversed, characterizing the language of the indenture as unambiguous and permitting Union Electric to call the bonds by special redemption as it had planned. The Eastern District remanded the case with instructions to enter partial summary judgment in favor of Union Electric with respect to its rights under the indenture.[6]

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[4] In essence, the trial court consolidated the first four counts of plaintiffs' petition. However, Count III alleging violations of Rule 10b-5, 17 C.F.R. § 240.10b-5 (1985), was dismissed by plaintiffs in recognition of exclusive federal jurisdiction over such claims.

[5] After the trial court entered judgment in favor of the class, it directed that the class be given notice of the judgment in its favor. This is the only notice ever directed to any class by the state courts.

[6] Pertinent portions of the indenture are set forth in *Harris I*, 622 S.W.2d at 242-44.

Harris II

On remand, the trial court entered its order effecting the directions of the appellate court. The plaintiffs were given additional time to file an amended petition. Subsequently, both plaintiffs and defendants filed applications for attorneys fees and costs in relation to the *Harris I* litigation. After a three-day evidentiary hearing, the trial court overruled Union Electric's application for fees. On November 1, 1982, the trial court entered its order granting plaintiff's attorneys' fees of $696,000 and expenses of $23,937.39.

The trial court based the fee award on a provision in the bond indenture permitting the court to exercise its discretion in awarding fees in any suit for the enforcement of rights under the indenture. As additional grounds, the trial court relied on "general equitable principles", to support the fee award, finding that plaintiffs' attorneys conferred a substantial benefit on the class by forestalling the redemption of the bonds.

Union Electric challenged the fee award on appeal. The Court of Appeals, Eastern District, found the fee award faulty on two grounds: first, plaintiffs received no tangible recovery, and second, Union Electric was granted summary judgment in *Harris I*. Furthermore, the court noted that the issues presented in plaintiffs' second amended petition had not been addressed. Although the trial court designated its order final and appealable, the court of appeals considered the fee award a "partial judgment" without any resolution of the substantive legal issues contained in the underlying claim. The court stayed

the attorneys' fees judgment pending final disposition of all issues and dismissed the appeal as premature.

Harris III

While the *Harris I* appeal was pending, the same three named plaintiffs in the state court proceedings filed a class action in the federal court alleging that Union Electric violated Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1982), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 (1985). Plaintiffs also realleged all of their state court claims. Specifically, plaintiffs claimed that the bond prospectus both misrepresented and omitted material facts regarding the call-protection provisions of the bond contract, and that the attempted plan to call the bonds constituted a scheme by Union Electric to defraud its bondholders. At the request of the parties, the federal court action was stayed pending the decision of the Missouri court of appeals on plaintiffs' state court claims for declaratory and injunctive relief (*Harris I*).

Following the decision in *Harris I*, on January 16, 1982, the federal district court certified the federal class as a Fed.R.Civ.P. 23(b)(3) class, defined as "all . . . present holders and transferees of the bonds". In May, 1983, the court redefined the federal class as all persons who held the bonds "as of the public redemption announcement by Union Electric Company on April 11, 1978." The district court further instructed that notice be given to all class members advising them of the nature of the action and their right to request exclusion from the class.

The notice described the federal class claims and expressly advised that a similar suit was pending in state court. The notice also stated that those requesting exclusion from the class "will not share in the benefits, if any, of any favorable judgment or settlement of [the 10b-5 claims] and will not be bound by any adverse judgment that may be rendered."

Of the more than 1,500 bondholders meeting the class definition, 194 bondholders holding 2094 bonds returned the forms and were granted exclusion from the federal class. Holders of ninety-seven percent of the bonds participated in the federal litigation.

Eventually, the district court lifted the stay on plaintiffs' 10b-5 claims. The stay was continued as to the pendent state claims awaiting adjudication in the state court. The federal suit proceeded to a bifurcated jury trial on the issues of liability and damages in the 10b-5 allegations.[7]

The plaintiffs' complaint at trial consisted primarily of allegations that the prospectus failed to disclose adequately Union Electric's right to redeem the bonds. The plaintiffs argued that the prospectus led them to believe that any general redemption of the bonds prior to maturity could only be made at premium prices (called "Regular Redemption Prices"). Union Electric's planned redemp-

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[7] The 10b-5 claim is the only issue ever to be determined by an actual trial. All other issues have progressed in a piecemeal fashion generated by a string of summary judgments granted to the plaintiffs by the state trial court and resulting in predictable appeals by the defendant.

tion was to be for par value (called "Special Redemption Prices"). Plaintiffs also contended that prior to March 1, 1985, no bonds could be redeemed where the money for the redemption was obtained at an interest cost of 10.6 percent or less per annum. Although *Harris I* established Union Electric's contractual right to redeem under these conditions, plaintiffs argued at the federal trial that the prospectus misrepresented this material fact.

The court instructed the jury that it could impose liability based upon a finding that Union Electric either: (a) employed a device, scheme or artifice to defraud; (b) made an untrue statement of material fact or omitted a material fact; or (c) engaged in an act, practice or course of business that operated as a fraud.[8] The jury returned a verdict in favor of the federal bondholder class, fixing damages at $2,716,140. The plaintiffs immediately dismissed all non-10b-5 claims without prejudice.

Relying on the judgment for damages, plaintiffs sought summary judgment on their claims for injunctive relief pursuant to Rule 10b-5 and their claims for attorneys' fees under the bond contract. On January 28, 1985, the federal district court found no evidence that Union Electric would attempt to redeem the bonds in the 31 days remaining in the disputed "no-call" period and refused to provide injunctive relief. In addition, the district court refused to award attorneys' fees against Union Elec-

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[8] These are the essential elements of unlawful conduct outlined in Rule 10b-5. 17 C.F.R. § 240.10b-5 (1985).

tric as plaintiffs requested, but held that all fees would be awarded from the judgment fund.[9]

Union Electric appealed. The United States Court of Appeals for the Eighth Circuit affirmed the judgment finding the evidence sufficient to sustain the jury verdict in favor of the class of bondholders. Specifically, the court ruled that the evidence indicated that the parties mutually intended that the bonds possess solid protection against call for ten years; that this protection was material, affected the price of the bonds, and was relied upon by plaintiffs; that the prospectus was ambiguous and misleading by omitting material facts that would have revealed Union Electric's right to call the bonds; and that Union Electric intended to defraud the plaintiffs when it announced its plan to call the bonds in 1978.

The federal appeals court also affirmed the measure of damages awarded to the class. The damages were calculated as the difference between the purchase price and the actual value of the bonds on the date they were issued. This formula represented the reduced value of the bonds caused by the lack of call protection.

On October 8, 1986, Union Electric paid into the registry of the district court the judgment of $2,716,240, with interest plus costs.

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[9] Plaintiffs based their request for fees on Article IX, Section 12 of the bond contract, the same provision relied upon in the *Harris II* controversy and the present appeal. Plaintiffs' counsel received more than one million dollars in fees and costs from the federal judgment fund.

The Present Appeal

Following the disposition of the federal litigation, the plaintiffs returned to state court and requested the stay of proceedings be lifted. Union Electric filed a separate motion to lift the stay and alternative motions for summary judgment and to set aside the award of attorneys' fees.

Subsequently, on the basis of the federal judgment, plaintiffs filed their third amended petition. Count I sought injunctive relief on behalf of the November 21, 1978, bondholder class and their transferees. Counts II and III sought an award of actual damages, based on attorneys' fees and expenses incurred in the "collateral" federal litigation and punitive damages against Union Electric based upon alleged violations of the federal securities laws other than Rule 10b-5 (Count II) and common law fraud (Count III). The last two counts are stated in behalf of a different class, defined as those bondholders who held the bonds on April 11, 1978, and who did not opt out of the federal suit. Plaintiffs moved for summary judgment on Count I. Union Electric and Centerre filed motions to dismiss.

On November 6, 1986, plaintiffs filed a proposed order for summary judgment on Count I. On January 6, 1987, the trial court entered the order without modification. Implicitly, the defendants' motions were overruled.

The order concluded that the facts necessary for summary judgemnt were fully established under principles of collateral estoppel in *Harris III*. The trial court found that the prospectus was misleading, that the provision in

the bond contract permitting redemption was "specifically contrary to the intended belief that Union Electric attempted to engender in the purchasers of the Series 2005 Bonds at the time of their original issue and sale," and that the use of cash in the Maintenance Fund for redemption constituted "a course of business or a device, scheme or artifice that operates as a fraud upon the [bondholders]." The court found that the redemption plan constituted "fraud and deceit, and constituted a violation of § 17a of the 1933 Act and of § 323(a) of the 1939 Act."

The trial court's order permanently enjoined Union Electric and Centerre from redeeming or attempting to redeem the bonds at a redemption price other than at the premium price listed on the bonds. The order precludes redemption at par and from using any money from the Maintenance Fund for the purpose of redeeming the bonds prior to maturity at other than the premium price. Consistent with its injunction order, the court entered summary judgment in favor of Centerre on Centerre's cross-claims against Union Electric. Centerre had sought directions on whether cash deposited in the improvement Fund could be used to redeem bonds at par value. The order also reaffirmed the November 1, 1982, award of attorneys' fees and granted interest on the fee award retroactive to November 21, 1982. The trial court also granted a request for added supplemental fees. Finally, the trial court's order entered summary judgment in favor of the plaintiffs on Count I of the third amended petition and against Union Electric and Centerre on their counterclaims.

The Court of Appeals, Eastern District, affirmed the judgment of the trial court. That court rejected Union

Electric's defense of *res judicata* and found the elements of common law fraud were established in *Harris III* and could be used offensively under the doctrine of collateral estoppel. The court of appeals found the injunctive relief granted to the class appropriate. Implicitly, the court lifted its prior stay on attorneys' fees litigated in *Harris II* and affirmed the additional attorneys' fees plus interest awarded by the trial court.

On transfer to this Court, Union Electric argues that the plaintiff's class was improperly certified and their claims barred by *res judicata*. Furthermore, Union Electric contends that the findings established in the prior Rule 10b-5 suit are not conclusive in establishing the elements of common law fraud. Additionally, Union Electric argues that injunctive relief constitutes a double recovery for the plaintiff class and is violative of the "benefit of the bargain" rule followed in Missouri courts. Finally, Union Electric alleges error in the judgment based on violations of federal securities laws and in the award of attorneys' fees.

II.

We turn initially to the question whether injunctive relief is an appropriate remedy for this class of plaintiffs. An injunction is an extraordinary and harsh remedy and should not be employed where there is an adequate remedy at law. *State ex rel. Phillips v. Yeaman*, 451 S.W.2d 115 (Mo. banc 1970).

Plaintiffs-respondents dispute that the damages recovered by members of their class constitute an adequate remedy at law. Although they concede that the federal

class was awarded the difference between the purchase price and the actual value of the bonds without call protection, respondents maintain that they will suffer additional damages in the event Union Electric ever redeems the bonds before maturity. It is this alleged prospective damage that forms the foundation of respondents' claim for injunctive relief.

In order to address these issues fully, we find it necessary to examine portions of the class separately.[10] We choose to segregate the claims into two categories; those who recovered damages in the federal action and those who opted out of the federal suit.

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[10] Union Electric suggests that the class be decertified. To bring a class action the prerequisites found in Rule 52.08 must be met. One of those requirements is that the claims and defenses of the representative party be typical of the class he represents. In conjunction with the typicality requirement, the named plaintiff must have legal standing to litigate the claims on behalf of the class. Because the named plaintiffs as well as the majority of the class were awarded damages in the federal action, they are not proper representatives to obtain additional relief on their own behalf or on behalf of others. They must succumb to the fundamental legal tenant [sic] that their recovered damages have "made them whole". In contrast, a class representative "must be a part of the class and possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriquez*, 431 U.S. 395, 403 (1977); *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir.), *cert. denied*, 449 U.S. 1079 (1980). Plaintiffs who cannot assert a claim individually cannot assert it on behalf of a class. *Foster v. Center Township of La Porte County*, 798 F.2d 237, 244-45 (7th Cir. 1986); *Kansas City, MO v. Williams*, 205 F.2d 47, 51 (8th Cir.); *cert. denied*, 346 U.S. 826 (1953).

While Union Electric may present a legitimate argument for decertification, we find that the same result can be reached on the plaintiffs' claims without the necessity of decertifying the class. Therefore, we continue our discussion by addressing the issues presented in the claim for injunctive relief.

A.

The Federal-Class Participants

1.

Undisputably, members of the federal class action who recovered money damages represent the largest sector of the present class. As certified by the federal court, holders of 97 percent of the bonds met the class definition and participated in the litigation. In total more than 1300 bondholders received a judgment amounting to $40.00 per $1,000 bond awarded by the federal court. This same group, with the addition of those who opted out of the federal litigation, now seeks injunctive relief from this Court.[11]

In Missouri, a victim of fraud has two options—he can return what he purchased and get his money back (recission), or keep what he purchased and sue for damages measured as the difference between its value as repre-

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[11] Union Electric argues vigorously that the plaintiffs' equitable claims are barred by *res judicata* because the federal court dismissed the 10b-5 equitable claims without prejudice, and because the federal plaintiffs voluntarily dismissed their non-10b-5 claims without prejudice. Rule 41(a), F.R.C.P., and Civil Rule 67.01, V.A.M.R., make it clear that plaintiffs have the right to dismiss claims without prejudice. Civil Rule 61.03, V.A.M.R., clearly provides: "A dismissal without prejudice permits the party to bring another civil action for the same cause, unless the civil action is otherwise barred." The plaintiffs' voluntary non-suit without prejudice "was not an adjudication of the claim, and was no bar to claimants refiling the same and its hearing by the [court]." *Royal Insurance Co. v. Rousselot*, 720 S.W.2d 2 (Mo. App. 1986). A dismissal without prejudice is not an adjudication on the merits or issues and therefore has no *res judicata* effect *Ritter v. Aetna Cas. & Sur. Co.*, 686 S.W.2d 563, 564 (Mo. App. 1985).

sented and its true value as of the date of purchase (benefit of the bargain). *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988); *Rosenblum v. Jacks or Better of America West*, 745 S.W.2d 754, 764 (Mo. App. 1988).

A plaintiff cannot obtain both damages on the contract and a remedy such as reformation or recission, which depends on rejection of the contract as written. *Timmons v. Bender*, 601 S.W.2d 688, 690 (Mo. App. 1980). Where a party having the right to pursue one of two inconsistent remedies makes an election, institutes suit and prosecutes it to final judgment, he cannot thereafter pursue an inconsistent remedy, regardless of whether the judgment was in his favor or against him. *King v. Guy*, 297 S.W.2d 617, 622 (Mo. App. 1956).

The plaintiffs-respondents elected to pursue in federal court their claim that they were induced to purchase the bonds in reliance upon fraudulent misrepresentations and omissions in violation of federal securities laws. The jury in the federal suit awarded the bondholders $2,716,240 in damages. The damages represented the difference between the market value of the bonds with the call protection declared in the prospectus and the market value of the bonds with the redemption features found in the indenture and held valid in *Harris I*. Such calculation of damages is consistent with the "benefit of the bargain" theory.

Nevertheless, plaintiffs-respondents contend that the federal judgment was retrospective and only compensated for the fraud on the market prior to the attempted call on April 11, 1978. Thus, although as a federal class they

obtained the difference between what they paid for the bonds and their true value on the date of purchase, respondents maintain they would suffer additional damage in the form of lost premium and interest payments in the event Union Electric ever redeems the bonds. It is for this additional "prospective" damage the plaintiff class seeks injunctive relief occasioned by an uncertain future redemption of the bonds.

By awarding the plaintiffs-respondents the difference between what they paid and what they should have paid if the right to redeem the bonds had been fully disclosed, the damages awarded in the federal suit put these plaintiffs in the same position as if they had known from the beginning that the bonds could be recalled. Thus, if Union Electric were to redeem the bonds presently, there can be no additional injury for which the federal plaintiffs have not already been compensated. In contrast, enjoining redemption gives these bondholders a bond of grossly inflated value. They have received an adjusted purchase price for a bond that can be redeemed at par, but now seek a bond that cannot be redeemed at par under any circumstances.

It is fundamental in our law that a plaintiff is entitled to one recovery for any wrong done to him. In Missouri, we adhere to a principle called the doctrine of election of remedies. This doctrine maintains that one may not both affirm and disaffirm a contract and may not obtain both damages for fraudulent inducement to enter into a contract and a remedy prohibiting the enforcement of the contract as written. *See Berger v. Mercantile Trust Co.*, 352 S.W. 2d 644 (Mo. 1961).

In the case at bar, we find inherent conflict in the plaintiffs-respondent's position. These plaintiffs elected to prosecute to final judgment their claim for damages in the federal court. The federal jury was instructed that Union Electric could redeem the bonds. The plaintiffs were awarded damages consistent with a finding that the bonds could be redeemed, but that the plaintiffs paid an inflated price for bonds without call protection.

In choosing to pursue this remedy, plaintiffs-respondents chose to affirm the contract and to sue for damages. Having made that election, and having been successful, plaintiffs cannot now disaffirm the contract as written and seek an injunction to conform the contract provisions to what plaintiffs originally believed them to be. It is a result such as this that the doctrine of election of remedies is meant to prevent. *See Empire Gas Corp. v. Small's LP Gas Co.*, 637 S.W.2d 239, 246 (Mo. App. 1982) (parties who unsuccessfully prosecuted a claim for damages for fraud were barred from claiming that enforcement of the contract as written was prohibited because of mutual mistake.)

2.

Next, plaintiffs-respondents contend that Union Electric's redemption rights must be enjoined because redemption of the bond on the terms approved in *Harris I* would be wrongful. They maintain on the basis of *Harris III* that Union Electric obtained its redemption right through fraud. These contentions are without merit. Union Electric failed to disclose its redemption rights adequately, causing the bondholders to pay too much. The inadequate disclosure violated Rule 10b-5. The federal

class received the difference between what they paid and what they should have paid. By electing to retain their bonds and sue for the difference in value, plaintiffs-respondents are prohibited from suggesting that Union Electric would be acting wrongfully if it now exercised the redemption rights confirmed in *Harris I*.

Finally, as an alternative justification for the injunction, plaintiffs-respondents urge that injunctive relief can be justified as a punitive measure on the grounds of "public policy", even if they have otherwise been made whole. Plaintiffs-respondents do not provide any support for this assertion nor has this Court encountered any such authority. We find that the remedy of an injunction is inherently compensatory, not punitive. *Hurtgen v. Gasche,* 227 S.W.2d 494, 498 (Mo. App. 1950). *See also Eichelbach v. Harding,* 309 S.W.2d 681, 684 (Mo. App. 1958). It is for this reason that an injunction will not lie where the plaintiff has an adequate remedy at law. *Walker v. Norris,* 145 S.W.2d 972, 973 (Mo. App. 1940). The plaintiffs have already demonstrated there is an adequate remedy at law by obtaining damages in the federal court suit.

We hold that the group of plaintiffs who participated in the federal suit have received adequate relief and are not entitled to an injunction that permanently protects their bonds from early redemption.

B.

Federal Opt Outs

The second category of plaintiffs in this class action are those who did not participate in the federal suit.

These "opt outs" are presumably a small fraction of the current class represented in this appeal. It is difficult to determine exactly how many federal class opt outs and their transferees are represented. No attempt has been made in the record before this Court to establish the identities of those who opted out of the federal action. We do know that the federal class was composed of those persons who held the Series 2005 bonds on April 11, 1978. After notice was given to those meeting the federal class definition, 194 bondholders requested exclusion from the litigation. However, those holding 97 percent of the total bonds issued did participate in the federal class. From this factor, we can deduce that no more than 3 percent of the total bonds issued were held by the federal opt outs or their transferees. It is the claim of this small group who did not benefit from the damage judgment which we now address.

Plaintiffs' representatives argue that because this portion of their class has received no recovery to date, this Court cannot "summarily disenfranchise" their claims for relief by rejecting their request for injunction. However, we hold the opt outs are not entitled to injunctive relief.

Plaintiffs-respondents maintain that this small group of bondholders has always been a part of the state class. The state class was defined and certified on November 21, 1978, seven months after the call date. The federal class, of which these bondholders opted out, was not certified until May, 1983. At the time these bondholders chose not to participate in the federal litigation, they had notice that their interests were being represented in the state court.

Also pertinent was the fact that the state class had already suffered a reversal of their award of injunctive relief in *Harris I*. Arguably, these federal opt out bondholders were put on notice that Union Electric possessed the contractual right to redeem the bonds at par. This becomes relevant in light of the fact that the *Harris I* decision was handed down nearly two years prior to the bondholders' choice not to participate in the federal litigation.

This Court is not privy to the reasons these bondholders opted out of the federal class. However, relevant to this period is the fact that the state court class appeared to be most interested in pursuing injunctive relief to forestall a bond redemption prior to March 1, 1985, the end of the "no-call" period.

The bondholders maintain they purchased the bonds believing that the bonds could not be called prior to March 1, 1985. No reasonable reading of the prospectus permits the conclusion that call protection extended beyond March 1, 1985. That date has come and gone. Therefore, we find, as did the federal district court, that the issue of enjoining the redemption of the bonds became moot on March 1, 1985. To enjoin Union Electric from ever redeeming the bonds before maturity is punitive. This Court will not enploy the strong arm of equity to enforce rights already lost. *Hurtgen v. Gasche*, 227 S.W.2d 494 (Mo. App. 1950).

> Neither court orders, nor injunctions nor any human agency can prevent the happening of things that have already occurred. Time does not stand still. In the language of a famous radio program: "Time Marches On." The utter futility of attempting to restrain acts that have already occurred or that are im-

> possible of future occurrence because of the passage of time, has been clearly recognized and declared by our Supreme Court . . . *Id.* at 497-98.

We hold that the group of plaintiffs who did not participate in the federal suit are not now entitled to injunctive relief.[12]

C.

Attorneys' Fees

Finally, we address the issue of attorneys' fees as awarded by the trial court's order. The first portion of the trial court's order reinstates $717,937.36 in fees awarded to plaintiffs-respondents' counsel in 1982 for services performed in obtaining the judgment reversed in *Harris I*. Union Electric's prior appeal of this award was rejected as premature in *Harris II*. In its January 6, 1987, order, the trial court reaffirmed this fee award with interest thereon from November 21, 1982. A separate fee award of $63,225 was granted to plaintiffs-respondents' counsel for additional costs and fees encountered in the present suit for injunction.

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[12] Both parties go to great lengths arguing the merits of the use of collateral estoppel in this appeal. Plaintiffs-respondents contend that collateral estoppel applies to the issues of common law fraud and securities law violations. Union Electric argues that the finding of a 10b-5 violation in *Harris III* is not identical or conclusive of the issues of fraud or other securities law violations. Because we find that injunctive relief is not appropriate in this case, we do not reach the merits of the underlying claims that were to support the relief. An appellate court opinion should be limited to those questions essential to a proper disposition of the appeal. *State ex rel. Ellsworth Freight Lines, Inv. v. State Tax Com'm of Missouri*, 651 S.W.2d 130, 133 (Mo. banc 1983).

The general rule in Missouri is that attorneys' fees are not awarded as a matter of right even to the successful litigant. *Arnold v. Edelman,* 392 S.W.2d 231, 239 (Mo. 1965). Rather, our law provides the recovery of fees only when they are provided for by contract, statute or where equity may require. *Osterberger v. Hites Construction Company,* 599 S.W.2d 221, 230 (Mo. App. 1980). Where the claim to attorneys' fees is based upon a contract, the court must adhere to the terms of the contract and may not go beyond it. *O. H. Breckmer Associates, Inc. v. V. S. DiCarlo General Contractors, Inc.,* 589 S.W.2d 96, 97 (Mo. App. 1979).

The November 1, 1982 fee award in favor of petitioners David L. Campbell and Edward Fredrickson was based on the court's findings that they were entitled to such fees because (1) the indenture authorized legal fees under Article IX, Section 12, and (2) they preserved a benefit for the bondholders since the practical effect of their lawsuit prevented Union Electric from redeeming the bonds, despite the fact they did not recover any tangible funds for the plaintiffs or succeed on the merits in *Harris I.* This latter reason is founded on "general equitable principles." We first examine the bond indenture.

Article IX, Section 12 of the Composite Indenture of the bond contract provides in pertinent part:

> [T]he parties to this Indenture and the Bondholders agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, . . . that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith

> of the claims or defenses made by such party litigant; *provided, however that the provision of this paragraph shall not apply . . . to any suit instituted by any Bondholder, or group of Bondholders, holding in the aggregate more than ten per cent (10%) in principal amount of the Bonds outstanding.* . . . (emphasis added)

The indenture is unambiguous; it precludes any award of attorneys' fees to plaintiffs on two separate grounds. First, to support an award, a party must first establish that it has a "right or remedy under the Indenture." Plaintiffs failed to establish any such right in *Harris I.* Instead, the court of appeals' opinion in *Harris I* conclusively establishes that respondents' claims under the indenture were without merit and that the indenture did not give them the "right or remedy under this indenture" they sought to enforce. The November 1, 1982, order awarding attorneys' fees for work performed in *Harris I* is contrary to the terms of the indenture.

Similarly, the January 6, 1987, award of additional fees for work performed in obtaining the injunctive relief was grounded on common law fraud and/or provisions of the securities law. The present claim is not premised on rights or remedies provided by the indenture and therefore the subsequent award of attorneys' fees cannot be sustained.

Second, like the present action, the litigation in *Harris I* was brought as a class action on behalf of all bondholders. Our attention here focuses on the portion of the indenture that expressly excluded authorization of attorneys' fees in a suit representing more than ten percent of the principal amount of bonds outstanding. We do not go

beyond the contract to award attorneys' fees for work prepared in these class action suits representing more than 90 percent of the bonds outstanding.

Moreover, this Court finds no support for these awards on the basis of "general equitable principles." An award of attorneys' fees to be paid by a successful defendant to attorneys for unsuccessful plaintiffs on the grounds of delay caused by the unsuccessful prosecution of a lawsuit is unprecedented. To sanction such an award on this basis would encourage frivolous actions whenever delay would prove beneficial. This unsound policy cannot be justified on equitable principles or public policy.

Inasmuch as the 1982 fee award must be reversed, the award of prejudgment interest must also be stricken. Prejudgment interest cannot be awarded on an interlocutory judgment. *Crawford v. Smithy,* 470 S.W.2d 529, 533 (Mo. banc 1971). The 1982 fee award was previously held to be an interlocutory order in *Harris II.*

We conclude that plaintiffs-respondents have no right under the indenture to obtain attorneys' fees. In the absence of any success on the merits, these petitioners have advanced no basis for ignoring the general rule that even a successful litigant is not entitled to an award of attorneys' fees as a matter of right. *Arnold v. Edelman,* 392 S.W.2d 231, 239 (Mo. 1965).

III.

The judgment of the trial court is reversed. The cause is remanded with directions to enter summary judgment in

favor of Union Electric, and for such other proceedings as may be consistent with this opinion.

EDWARD D. ROBERTSON, JR., Judge

Blackmar, Welliver, Rendlen, Higgins, JJ., and Gaitan, Sp.J., concur. Billings, C.J., not participating. Covington, J., not participating because not a member of the Court when cause was submitted.

APPENDIX B

No. 70374

Circuit Court No. 408427

IN THE SUPREME COURT OF MISSOURI

January Session, 1989

Harold Harris, et al.,

Plaintiffs-respondents,

and

David L. Campbell and
Estate of Edward W. Fredrickson,

Petitioners-respondents,

and

David L. Campbell,

Petitioner-respondent,

vs. Appeal from the Circuit Court of St. Louis County
Union Electric Company, et al.,

Defendants-Appellants.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form of aforesaid, by the said Circuit Court of St. Louis County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellants be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of St. Louis County for further proceedings to be had therein, in conformity with the opinion of this court herein delivered; and that the said appellants recover

against the said respondents costs and charges herein expended, and have execution therefor.
(Opinion filed.)

Costs:	Docket Fee:	$-20.00
	Transcript:	722.50
		$742.50

STATE OF MISSOURI—Set.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1989 and on the 14th day of February 1989, in the above entitled cause.

Given under my hand and seal of said Court at the City of Jefferson City, this 14th day of February 1989.

/s/ THOMAS F. SIMON, Clerk
by: MARY ELIZABETH MCHANEY, D.C.

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, Individually and as Representatives of a Class,	
Plaintiffs-Respondents,	
and	
DAVID L. CAMPBELL and ESTATE OF EDWARD W. FREDRICKSON,	No. 52784
Petitioners-Respondents,	Appeal from the Circuit Court of the County of St. Louis
and	
DAVID L. CAMPBELL,	Honorable James R. Hartenbach
Petitioner-Respondent,	OPINION FILED: January 19, 1988
vs.	
UNION ELECTRIC COMPANY,	
Defendant-Appellant,	
and	
CENTERRE TRUST COMPANY, formerly St. Louis Union Trust Company,	
Defendant-Appellant.	

In this consolidated appeal defendants, Union Electric Company (UE) and Centerre Trust Company (Centerre), appeal from the trial court's grant of summary judgment in favor of plaintiffs, Harold Harris, Continental Casualty Company, and National Fire Insurance Company of Hartford, as individuals and as representatives of a class of UE bondholders, enjoining UE from redeeming certain bonds at par value from money deposited with its trustee, Centerre; reaffirming a prior award of attorneys' fees and expenses, plus interest, to petitioners, David Campbell and the Estate of Edward W. Fredrickson (plaintiffs' counsel); and awarding additional attorneys' fees to plaintiffs' counsel. We affirm.

The record reveals that in March 1975 UE issued its Series 2005 Bonds to the public. Plaintiffs were purchasers of the bonds. The prospectus led plaintiffs to believe that any general redemption of the bonds prior to maturity could only be made at premium prices (called "Regular Redemption Prices") listed on the bonds and that, prior to March 1, 1985, no bonds could be redeemed where the monies for such a redemption were obtained, directly or indirectly, from or in anticipation of borrowings by or for the account of Union Electric at an effective interest cost of 10.6 percent or less per annum.

On April 11, 1978, UE publicly announced its plan to redeem at par value (called "Special Redemption Prices") approximately $50,000,000 of the bonds pursuant to Article VIII, Section 8 of the bond indenture and to issue a corresponding amount of new bonds at 9.35 percent. UE borrowed money for this redemption at an interest rate of less than 10.6 percent per annum. UE

deposited this money with its trustee, Centerre: $49,187,000 in its Maintenance Fund and $700,000 in its Improvement Fund.

On May 10, 1978, plaintiffs, as individuals and as representatives of the bondholders, instituted an action in state court, challenging UE's right to redeem the bonds. They sought declaratory and injunctive relief as well as damages. By consent of the parties, a class was certified and plaintiffs were named as representatives of all the bondholders who held bonds as of November 21, 1978 and their transferees. The trial court granted summary judgment in favor of plaintiffs on the basis that UE lacked the contractual right to carry out the redemption plan as announced. On appeal, this court reversed the judgment of the trial court and construed Article VIII, Section 8 of the bond contract to authorize lower cost refunding at par value while reserving the issue of the adequacy of the prospectus for the trial court. *See* Harris v. Union Electric Company, 622 S.W.2d 239, 251 (Mo. App. 1981) (*Harris I*). On remand, the trial court entered partial summary judgment in favor of UE. Plaintiffs then filed a second amended petition.

Both plaintiffs and UE filed applications for attorneys' fees and costs in the state action pursuant to Article IX, Section 12 of the bond indenture. The trial court awarded fees and expenses to plaintiffs' counsel and denied UE's request for similar relief. UE appealed only that portion of the judgment awarding fees and expenses to plaintiffs' counsel. This court dismissed the appeal on the ground that the trial court's order was not final for purposes of appeal. *See* Harris v. Union Electric Co., 685 S.W. 2d 607 (Mo. App. 1985) (*Harris II*).

In the meantime, in February 1980, plaintiffs also brought an action in federal district court, alleging violations of Rule 10b-5[1] and realleging their state claims. The district court stayed proceedings pending the decision of this court. After the decision in *Harris I*, plaintiffs filed an amended complaint in federal district court and asked the court to lift and set aside its order staying the proceedings. In April 1982, the district court lifted the stay as to the Rule 10b-5 claims only, but continued the stay on the pendant claims until there was an adjudication in the corresponding state case.

The Rule 10b-5 damage claims were tried in a bifurcated trial on the issues of liability and damages. The class was certified as holders of the Series 2005 bonds as of April 11, 1978, the date on which UE had announced the redemption plan. The class consisted of 1,500 bondholders, holding a total of 67,906 bonds. The class obtained

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[1]Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mail or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud.
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order ot make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. Section 240.15b-5 (1985).

a judgment against UE, pursuant to a jury verdict. The damages were assessed at $2,716,420, an amount which represented the lower value of plaintiffs' bonds due to the possibility of refunding. The damages were measured by the difference between the purchase price of the bonds and their actual value on the date of issue. Plaintiffs then dismissed without prejudice all claims, other than the Rule 10b-5 claims. The district court dismissed plaintiffs' claim for injunctive relief under Rule 10b-5 without prejudice. The district court also dismissed without prejudice plaintiffs' application for attorneys' fees and expenses pursuant to Article IX, Section 12 of the bond indenture.

UE appealed the damage award to the United States Court of Appeals, Eighth Circuit. The state court stayed proceedings pending the disposition of the federal appeal. The Eighth Circuit affirmed the district court's judgment and held there was substantial evidence from which the jury could find that the prospectus violated Rule 10b-5 because the prospectus was ambiguous and misleading in that it omitted material facts that would have revealed UE's right to call the bonds. Harris v. Union Electric Co., 787 F.2d 355 (8th Cir.), *cert. denied*, 107 S.Ct. 94 (1986) (*Harris III*). The Eighth Circuit held that "UE intended to defraud the investors of this [call] protection when it announced its plan to call the bonds in 1978, causing the market value of the bonds to drop." After denial of its petition of writ of certiorari by the United States Supreme Court, UE satisfied the federal court judgment.

Plaintiffs then filed their third amended petition in state court. In Count I, plaintiffs averred that, although UE had temporarily cancelled the redemption plan and

had withdrawn $49,187,000 from the Maintenance Fund, it continued "to maintain in pleadings filed in this Court" that it would effectuate such a redemption plan in the future if circumstances made it advantageous to do so. Count I sought injunctive relief on behalf of the named plaintiffs and the November 21, 1978 bondholder class and their transferees to prevent UE from proceeding with the redemption plan. Count I also sought an award of attorneys' fees and costs incurred in the state action. Counts II and III sought additional relief. Those counts remain pending and are not considered in this appeal.

UE and Centerre then filed motions to dismiss. UE argued that plaintiffs' claims were barred by the res judicata effect of the federal litigation in which plaintiffs had in fact received the benefit of an adequate remedy at law by way of damages. Centerre posited that plaintiffs had been fully compensated for their damages in the federal action. UE also filed a motion to vacate and set aside the November 1, 1982 order awarding attorneys' fees to plaintiffs' counsel and to strike and dismiss the application for additional attorneys' fees which had been filed on October 23, 1986.

The trial court granted summary judgment in favor of plaintiffs on Count I of plaintiffs' petition, in favor of plaintiffs on the counterclaims of Centerre and UE, and in favor of Centerre on the cross-claims of Centerre and UE. Based on *Harris III*, the trial court found that the prospectus and registration statement were misleading with regard to UE's redemption rights. The trial court's order permanently enjoined UE and Centerre from redeeming or attempting to redeem the bonds at a redemp-

tion price other than at the premium price listed on the bonds, with certain exceptions, and from using any monies from the Maintenance Fund for the purpose of redeeming the bonds prior to maturity at other than the premium price. The order also reaffirmed the November 1, 1982 award of attorneys' fees to plaintiffs' counsel, awarded interest on that award retroactive to November 1, 1982, and awarded additional fees to plaintiffs' counsel. The trial court designated its judgment final for purposes of appeal.[2]

UE'S APPEAL

In its first point, UE claims the trial court erred in granting an injunction in favor of plaintiffs because res judicata bars the state action. The doctrine of res judicata, or claim preclusion, prevents the same parties from relitigating the same cause of action. Ste. Genevieve County v. Fox, 688 S.W.2d 392, 395 (Mo. App. 1985). Application of res judicata requires four elements: (1) identity of thing sued for; (2) identity of cause of action; (3) identity of person or parties to cause of action; and (4) identity of quality of person for or against whom claim is made. Lewis v. Barnes Hospital, 685 S.W.2d 591, 594 (Mo. App. 1985). Res judicata is applicable whether the judgment involved is rendered by the same or by a different court. Gribben v. Lucky Star Ranch Corp., 623 F. Supp. 952, 959 (D.C. Mo. 1985). Class members are bound, if adequately represented, by the decision on the issues raised and actually litigated in a certified class

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[2]UE and Centerre did not appeal the trial court's ruling on the counterclaims or the cross-claims.

action. State, ex inf., Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 120 (Mo. App. 1984) (quoting Hansberry v. Lee, 311 U.S. 32, 42 (1940)).

Here, the members of the class in Count I of the present state action (bondholders as of November 21, 1978 and their transferees) are different from the members of the class in the prior federal litigation (bondholders as of April 11, 1978). There is no mutuality between the class members in both actions. The prior judgment is therefore not binding on the plaintiff-class in the present action.

UE argues that some of the members of the class in Count I also held their bonds on April 11, 1978 and, because those members received damages under the federal judgment, they are now barred from relitigating the same claims in state court. UE also contends that those members of the class who purchased their bonds after April 11, 1986 did so with the knowledge that the bonds were callable and, therefore, were not entitled to relief against UE for fraud.

UE's argument is without merit. The judgment in federal court was limited to the class defined in that action. The class was certified pursuant to Fed. R. Civ. P. 23(b)(3). In a Rule 23(b)(3) class action, the judgment includes only those persons who have received notice and who are found to be members of the class because they did not request exclusion from that class. Johnson v. City of Baton Rouge, La., 50 F.R.D. 295, 300 (E.D. La. 1970); *see also* Fed. R. Civ. P. 23(c)(3) A party has the option of excluding himself from the class. *See* Fed. R. Civ. P. 23(c)(2). A party is not required to be a member of the class; and an absent party is not barred from bring-

ing a subsequent action against the same defendant. The judgment in federal court has no res judicata effect against a class which includes members who "opted out" of the federal class action.

Admittedly, some of the requisite elements for the application of res judicata are present in the instant action. The failure to have identity of the class members in both actions, however, precludes the application of res judicata to bar the present state action.

UE also asserts that the trial court erred by finding that UE committed fraud based on the theory of collateral estoppel. Collateral estoppel, or issue preclusion, prevents a party from relitigating in a subsequent suit a fact issue which was judicially determined in a prior suit. Hill v. Air Shields, Inc., 721 S.W.2d 112, 119 (Mo. App. 1986). The test for determining whether the application of collateral estoppel is appropriate is: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Id.*

We review the record of this case against the backdrop of the four-part test for collateral estoppel. First, we consider the identity of the issues in the prior and in the present action. In the prior action, the Eighth Circuit Court of Appeals found that UE's conduct was fraudulent:

> [T]he plaintiffs produced sufficient evidence for the jury to have found that the prospectus is ambiguous and misleading in that it omitted material facts that would have adequately disclosed UE's right to call the bonds, in violation of Rule 10b-5(b). We also conclude that the evidence is sufficient for the jury to have found that these omissions were part of a larger scheme or course of business to defraud the bondholders. To knowingly implement a plan in 1978 to call bonds that were previously intended and marketed as having solid call protection until 1985, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders. . . .

Harris III, 787 F.2d at 365-366.

In the state action before us, the trial court held:

> The use by Union Electric of cash in the Maintenance Fund under the Article VIII, Section 8 redemption device provided for in the Composite Indenture to redeem Series 2005 Bonds constitutes a course of business, or a device, scheme or artifice, that operates as a fraud upon the holders of the Series 2005 Bonds; and that, as such, the use of cash in the Maintenance Fund to redeem bonds at par under said Article VIII, Section 8 redemption device, constitutes *fraud and deceit,* and constitutes a violation of Section 17(a) of the 1933 Act and of Section 323(a) of the 1939 Act.

(emphasis added).

In the state action, we first review the trial court's finding that the redemption plan constituted common law fraud. Although the federal damage action specifically addressed UE's fraud in the context of a Rule 10b-5 violation, we look to the federal action to determine if the elements of common law fraud coincide sufficiently with the elements of a Rule 10b-5 violation such that the issues are identical in both actions.

Because summary judgment was granted on plaintiffs' action for an injunction, we first look to plaintiffs' third amended petition to see if fraud was pleaded. Plaintiffs' petition contained a demand for relief, based upon, *inter alia*, common law fraud. UE did not file any motions in the trial court attacking the sufficiency of plaintiffs' allegations of the elements of fraud. Clearly, UE was apprised of plaintiffs' grounds for relief and defended accordingly.

We next consider whether *Harris III*, which was based upon fraud under Rule 10b-5, also addressed the elements of common law fraud. Rule 10b-5 proscribes fraudulent conduct in connection with the purchase and sale of securities. *Harris III*, 787 F.2d at 362. To succeed in a private action pursuant to Rule 10b-5, a plaintiff must establish 1) that the defendant acted in a manner prohibited by the Rule, whether it be that the defendant employed a device, scheme, or artifice to defraud, made misrepresentations or omissions of material fact, or engaged in acts, practices, or courses of business that operate as a fraud or deceit; 2) causation, often analyzed in terms of materiality and reliance; 3) damages; and 4) that the fraudulent activity occurred in connection with the purchase and sale of a security. *Id.* A finding of scienter, that is, an "intent to deceive, manipulate, or defraud," is also a prerequisite to recovery under Rule 10b-5. *Id.*

The Eighth Circuit analyzed the various elements of a Rule 10b-5 violation. The court then stated:

> In sum, we hold that the verdicts are supported by substantial evidence in the record. The plaintiff in-

> troduced sufficient evidence from which the jury could have found that the parties mutually intended that the bonds would possess solid protection against call for ten years, that this protection was material and affected the price of the bonds, and that it was relied upon by the plaintiffs. The evidence also supported a finding by the jury that UE intended to defraud the investors of this protection when it announced its plan to call the bonds in 1978, causing the market value of the bonds to drop. Finally, the evidence showed that as a result of UE's fraudulent conduct between March, 1975 and April, 1978, the value of the bonds purchased by the plaintiffs was less than the price they paid, which was reflected by the market drop once the investors discovered the fraud.

Harris III, 787 F.2d at 370-71. This holding sufficiently establishes an intentional, material misrepresentation which UE communicated to the bondholders who were unaware of its falsity and who were injured in relying upon it. It is clear from the opinion in *Harris III* that plaintiffs established not only the elements of a Rule 10b-5 violation but also the requisite elements of common law fraud. The issue of UE's fraudulent conduct was identical in the prior federal action and in the present state action. The first element for collateral estoppel, i.e., identity of issues, is satisfied.

We next address the remaining three elements for the application of collateral estoppel. The prior federal adjudication resulted in a judgment on the merits. UE was a defendant in the prior adjudication. UE had a full and fair opportunity to litigate the issue of its fraudulent conduct in connection with the misleading call protection provisions in the bond's prospectus.

We reject UE's argument that collateral estoppel does not apply because the federal damage action was a jury verdict and it is impossible to determine upon which operative facts the jury relied. Clearly, the jury was required to find, as matter of fact, that UE committed fraud in order to find a Rule 10b-5 violation and to assess damages.

The facts of this case satisfy the requisite elements for collateral estoppel and warrant its application. The issue of UE's fraud was judicially determined in the previous federal action. In the present state action, no genuine issue of fact exists as to UE's fraud. The trial court properly granted summary judgment for injunctive relief in favor of plaintiffs on the basis of the collateral estoppel effect of the prior federal action.

In view of our holding, we do not address the issue of whether the trial court correctly found UE's fraud to also be a violation of Section 17(a) of the Securities Act of 1933, 15 U.S.C.A. Section 77(q), and of Section 323(a) of the Trust Indenture Act of 1939, 15 U.S.C.A. Section www(a).

UE next argues that the dismissal of the equity action in federal court operated as a denial of injunctive relief and bars plaintiffs from relitigating their claims for injunctive relief in the present action. It is clear that the dismissal of the equitable claim in federal court was without prejudice and does not bar a similar action in state court. The district court's order specifically stated that state court had jurisdiction over those claims. UE's first point is denied.

In its second point, UE raises several points of error. UE first claims error in the trial court's grant of sum-

mary judgment because the injunction is inconsistent with this court's holding in *Harris I*. In *Harris I*, this court held that UE had a contractual right to redeem the bonds at par value with cash from its Maintenance and Improvement Funds. UE contends that the trial court cannot now enjoin it from exercising this valid redemption right.

The trial court's judgment does not conflict with the *Harris I* opinion. In *Harris I*, this court specifically reserved to the trial court the issue of the adequacy of the prospectus:

> [O]ur determination that UE does have the right to redeem under the bond contract, revives the issue of whether the Prospectus adequately disclosed the redemption possibilities. That issue, though is not properly before us as the trial court did not reach it. Upon remand the trial court will have the opportunity to make its judgment on the adequacy of the Prospectus in the light of our holding.

Harris I, 622 S.W.2d at 244.

In the case *sub judice*, the trial court recognized the holding in *Harris I* that UE had the contractual right to redeem the bonds. Relying on *Harris III*, however, the trial court determined that UE had procured that contractual right through fraud in its prospectus. The trial court merely refused to permit UE to exercise an otherwise valid contractual right which it had secured through its own fraud.

UE also argues that plaintiffs had an adequate remedy at law by way of money damages which plaintiffs elected to pursue and to recover in the federal litigation. UE posits that those plaintiffs who held onto the bonds after they were aware of the call provision made a "second

investment decision" to retain the bonds and thereby ratified the bond contract which included the call provision.

We first consider whether, under the facts of this case, injunctive relief was an appropriate remedy. Injunctive relief is discretionary and does not issue as a matter of right. Hudson v. School District of Kansas City, 578 S.W.2d 301, 311 (Mo. App. 1979). An injunction may issue "to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." Section 526.030 RSMo (1986); *see also* Smith v. Western Electric Co., 643 S.W.2d 10, 13 (Mo. App. 1982). When the remedy at law is inadequate or incomplete and the condition is such that equity can give more complete, efficient, prompt and practical relief, an action in equity is the proper remedy. Thompson v. City of Malden, 118 S.W.2d 1059, 1065 (Mo. App. 1938).

Prefatorily, we note that the members of the class in the prior federal action received money damages which were measured by the difference between the purchase price of the bonds and the actual value of the bonds on the date of issue. UE does not argue that those persons who opted out of the class in the federal litigation have an aedquate remedy at law by way of damages and should be compelled to pursue that legal remedy. UE also does not contend that the members of the plaintiff-class in the present action, who were also members of the class in the federal action, should be somehow culled out of the present class because they have been fully compensated by the damage award in the federal suit. We therefore do not reach those issues.

We address only the issue UE raised: whether the plaintiffs in the present action were adequately compensated by the damage award in the federal litigation. As discussed earlier in this opinion, the members of the class in the present action are not identical to the members of the class in the prior federal action. Some members of the present class opted out of the federal litigation and did not participate in the damage award.

It can be assumed that those members who opted out of the federal litigation eschewed compensation by way of money damages. The damages in the federal suit were measured by the difference between the amount the purchasers paid for the bonds and the actual value of the bonds. Those who opted out of the federal damage suit obviously elected to seek equitable relief to secure for themselves the full benefit of their bargain. The present plaintiff-class, therefore, consists of some bondholders who made an initial investment decision when they first bought the bonds and who now want the very thing which they thought they had purchased.

In addition, an injunction against redeeming the bonds is appropriate even for those members who did not opt out of the federal action. Those members were compensated based on their actual money damages. The method in which those damages were calculated merely compensated the members of the federal plaintiff-class for their damages up to that point in time; they were not prospective in nature. The injunction in the instant case, however, restrains UE from redeeming the bonds in the future, thereby preserving the entire investment of those who did not opt out of the federal action. The injunction

prevents future damage to *all* members of the present plaintiff-class, damages which would be difficult if not impossible to ascertain in an action at law.

We do not accept UE's characterization that, by holding onto the bonds, plaintiffs made a second investment decision to accept the bonds as written. It is just as conceivable that plaintiffs held onto the bonds and sought the full benefit of their bargain by enjoining the fraudulent conduct of UE. Equitable relief is entirely proper in this situation because an injunction renders to the members of the present plaintiff-class the very bonds to which they are entitled. Given the facts of this case, an injunction, therefore, "can give [plaintiffs] more complete, efficient, prompt and practical relief. . . ." *Thompson*, 118 S.W.2d at 1065. UE's second point is denied.

In its third point, UE claims that the trial court erred by granting an injunction based on Section 323(a) of the Trust Indenture Act of 1939 and Section 17(a) of the Securities Act of 1933. UE argues that neither statute gives plaintiffs a private right of action, that the statute of limitations bars claims under these statutes, and that the Eighth Circuit's opinion in *Harris III* did not establish a violation of either of these statutes. In view of our holding under Point II that plaintiffs made a case for injunctive relief under a theory of common law fraud, we need not address the issues raised by UE relative to an injunction based upon a violation of either of these federal statutes. UE's third point is denied.

In its fourth point, UE contends that the trial court erred by reinstating the 1982 award of attorneys' fees and expenses, plus interest, and in awarding additional attor-

neys' fees to plaintiffs' counsel. Plaintiffs' counsel concede that "[t]he general rule in Missouri is that attorneys' fees are not awarded even to a successful litigant, except as provided by contract or statute, or in unusual circumstances where equity requires." *See, e.g.,* Porter v. Hawks Nes, Inc., 659 S.W.2d 786, 789 (Mo. App. 1983). We note that UE does not challenge the amount of attorneys' fees as being excessive.

Article IX, Section 12 of the bond indenture provides in pertinent part:

> [T]he parties to this Indenture and the Bondholders agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant. . . .

UE argues that plaintiffs are not suing "for the enforcement of any right or remedy" pursuant to Article IX, Section 12 of the indenture. UE claims that, because it enjoys the contractual right to redeem the bonds, plaintiffs' suit to enjoin the exercise of a valid contractual right conflicts with the express terms of the indenture.

We do not agree. Plaintiffs' action relates to whether or not UE can enforce its contractual right to redeem the bonds. Plaintiffs seek to prevent UE from exercising the redemption right it procured through its own fraud. Plain-

tiffs are, therefore, suing to enforce a "right or remedy" which the prospectus fraudulently led them to believe they had when they purchased the bonds.

In addition, UE filed its own application with the trial court seeking attorneys' fees based upon Article IX, Section 12 of the bond indenture. In the application UE acceded that the "claims of plaintiffs in this point fall within the categories" mentioned in Article IX, Section 12 of the bond contract. In the absence of contradictory evidence, judicial admissions against interest are conclusive against the party making them. Sebree v. Rosen, 393 S.W.2d 590, 602 (Mo. 1965). Here, UE's position on appeal is inconsistent with its previous position that plaintiffs' claims fell within the purview of Article IX, Section 12 of the bond indenture. It stands admitted that plaintiffs' counsel are entitled to seek attorneys' fees. UE's final point is denied.

CENTERRE'S APPEAL

Centerre claims three points of trial court error. In its first point, Centerre claims the trial court erred by granting summary judgment in favor of plaintiffs and against UE and Centerre without specifically and clearly delineating what Centerre could or could not do with monies in the Improvement and Maintenance Funds.

Centerre states in its brief its interpretation of the trial court's order and requests a clarification from this court. Centerre neither cites authority nor does it make an argument to support its request for this court's clarification of the trial court's order. If Centerre had wanted a clarification of the order, the request should have been

directed to the trial court. Centerre fails to state wherein and why the ruling of the trial court was erroneous as Rule 84.04(d) requires. Thus, no trial court error is presented for review. Thummel v. King, 570 S.W.2d 679, 684 (Mo. banc 1978).

Centerre seeks, in effect, an advisory opinion from this court as to the correctness of its interpretation of the trial court's order. Appellate courts do not generally render advisory opinions. American Fence Co. v. Summers, 719 S.W.2d 496, 498 (Mo. App. 1986). A request for an advisory opinion does not invoke this court's jurisdiction to review matters presented to it. Since there is no actual controversy requiring relief, we deny the request. Wasinger v. Labor & Industrial Relations Commission, 701 S.W.2d 793, 795 (Mo. App. 1985). Centerre's first point on appeal is denied.

Centerre next claims the trial court erred by granting summary judgment in favor of plaintiffs and against UE and Centerre on the basis of violation of Section 17(a) of the Securities Act of 1933 and on the basis of Section 323(a) of the Trust Indenture Act of 1939. Centerre claims Section 17(a) of the 1933 Act does not provide a private cause of action to plaintiffs. Centerre also claims Section 323(a) of the Trust Indenture Act of 1939 cannot be a basis for plaintiffs' cause of action because it does not apply to bond analysis provisions required in UE's prospectus, and because the statute of limitations under Section 323(a) bars plaintiffs from bringing this action. As discussed in our holding under UE's Point II and Point III on appeal, plaintiffs made a case for injunctive relief under a theory of common law fraud, and therefore,

we need not address issues raised relative to an injunction based upon a violation of either of these acts. Centerre's final points are denied.

The judgment of the trial court is affirmed.

/s/ William H. Crandall, Jr.
William H. Crandall, Jr., Judge

Simon, P.J., Grimm, J., concur.

APPENDIX D

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, etc., et al.	)	
	)	Cause No. 408,427
Plaintiffs,	)	
	)	Division No. 14
vs.	)	
	)	
UNION ELECTRIC COMPANY, a corporation,	)	
	)	
Defendants.	)	

ORDER

The matter is before the Court on the Motion of the Plaintiffs, Harold Harris, Continental Casualty Company and National Fire Insurance Company of Hartford, for Summary Judgment on Count I of the Second Amended Petition, and on the Motion of Union Electric Company for Summary Judgment on Count I of the Second Amended Petition, which said Motions the Court has considered as having been directed to Count I of the Third Amended Petition, which in turn embodies those same factual and legal issues previously embodied in Count I of the Second Amended Petition, and which are addressed by said Motions for Summary Judgment.

Having heard and considered the oral arguments of counsel for the parties, and after careful consideration of the pleadings, the Class Determination Order entered by

the Court on November 21, 1978, the Memorandum, Order and Decree entered by the Court on November 1, 1982, the holdings of the United States Court of Appeals, Eighth Circuit, in the case of *Harris, et al. v. Union Electric Company,* reported at 787 F.2d 355 (8th Cir. 1986); *cert. den.*, — U.S. — (10/6/86), the depositions, testimony, affidavits, exhibits, briefs, suggestions and memoranda filed herein, and being duty advised in the premises, the Court hereby FINDS AND DETERMINES THAT:

1. The plaintiff, Harold Harris, is, and on April 11, 1978 was, the holder of twelve Series 2005 Bonds, face value of $1,000.00 each, having purchased said bonds upon their original issue on or about March 26, 1975 from R. Rowland & Co., Inc., in the City of St. Louis and held there at all times since then; and plaintiff, Continental Casualty Company, is the present holder of Series 2005 Bonds in the aggregate face amount of $5,000.00, and on April 11, 1978 was the holder of $1,000,000 of said Bonds, $500,000 of which it purchased on April 30, 1975 through Bache & Co., and $500,000 of which it purchased on October 13, 1975 through Soloman Brothers; and plaintiff, National Fire Insurance Company of Hartford, is the present holder of Series 2005 Bonds in the aggregate face amount of $5,000.00, and on April 11, 1978 was the holder of $3,000,000 of said Bonds, $1,500,000 of which bonds it purchased through Loeb Rhoades & Co. on May 8, 1975, $1,000,000 of which it purchased through Loewi & Co., Inc. on May 8, 1975, and $500,000 of which it purchased through Paine, Webber, Jackson and Curtis, Inc. on May 13, 1975. In addition to representing themselves individually, plaintiffs, pursuant to the Order of this Court dated November 21, 1978 (hereinafter called the "Class Determination Or-

der"), the findings of which are hereby reaffirmed, ratified and confirmed, represent a class consisting of the holders of the Bonds as of the date of the Class determination Order, and their transferees.

2. Defendant Union Electric Company is a Missouri corporation engaged in the business of generating, transmitting and distributing electricity in the States of Missouri, Illinois and Iowa. On March 26, 1975, Union Electric issued and sold an aggregate of $70,000,000 of the Bonds. The Bonds were dated March 1, 1975 and were secured by the Mortgage and Deed of Trust between Union Electric and its Mortgage Trustee, defendant Centerre Trust Company, formerly, St. Louis Union Trust Company, dated June 15, 1937, as amended and supplemented by the Second Supplemental Indenture thereto, dated May 1, 1941, and by all further amendments and supplements thereto, up to and including the Supplemental Indenture dated March 1, 1975.

3. The redemption features of the Bonds were negotiated between Union Electric and various Underwriters, of whom Merrill Lynch, Pierce, Fenner & Smith, Inc. was the lead Underwriter. It was agreed, and Union Electric knew, that, under existing conditions, the Bonds would be marketable and attractive to the public only if the Bond purchasers believed that the Bonds provided for ten-year protection against refunding at a lower interest rate, and provided that any general redemption of Bonds prior to maturity would be at a premium, namely, the Regular Redemption Price. The price of the Bonds was predicated upon such agreements, without which the price of the Bonds would have been higher, if they could have sold at all.

4. At the time the Bonds were issued and sold, Union Electric intended the purchasers of the Bonds to understand and believe (a) that any general redemption of the Bonds prior to maturity could only be made at the premium prices—the Regular Redemption Prices; and (b) that prior to March 1, 1985, no Bonds could be redeemed where the monies for such redemption are obtained, directly or indirectly, from or in anticipation of borrowings by or for the account of Union Electric at an effective interest cost of 10.60% or less per annum. The Bonds were purchased by the public based on such understandings, intentions and beliefs.

5. The 1975 Supplemental Indenture provides for a Maintenance Fund and an Improvement Fund, the intended purpose of which was to protect the Bondholders from diminution, in value, or depreciation or loss of the property securing payment of the Bonds. At the time of the issue and sale of the Bonds, the Maintenance Fund was generally considered only to be a protection for the Bondholders to insure that the value of the security was maintained and kept intact.

6. Although adequate property additions and other credits were available to it at the time in order to fully satisfy the Maintenance Fund and Improvement Fund contributions required under the Indentures, on April 14, 1978, Union Electric deposited with Centerre, as Trustee, the sum of $700,000 to be credited to the Improvement Fund for the Bonds and the sum of $49,187,000 to be credited to the Maintenance Fund. The monies for these deposits were obtained by Union Electric through short-term borrowings at an interest rate of less than 10.60% per annum. In mak-

ing the deposits, Union Electric intended to circumvent both the premium price for redemption of Bonds prior to maturity and the prohibition against refunding the Bonds at a lower interest rate contained in the Indenture. Simultaneously with the deposits, Union Electric notified the Bondholders of its intent to redeem, at par, approximately $50,000,000 of the Bonds, and announced its intention to issue a corresponding amount of new Bonds at 9.35%, the proceeds of which were to be used to liquidate the short-term borrowings from which the money used for the deposits with the Trustee had been obtained. On May 10, 1978, the instant action was filed, inter alia, challenging Union Electric's right to thus redeem the Bonds. On June 19, 1978, Union Electric announced that it was cancelling its plan to redeem the Bonds stating that it was effectively prohibited from proceeding with the redemption by Plaintiffs' lawsuit. Union Electric withdrew the $49,187,000 previously deposited in the Maintenance Fund, although it has stated, and asserts in its pleadings before the Court, that it intends to make similar deposits and to reactivate its redemption plan if they deem circumstances appropriate to do so. The Trustee continues to hold the $700,000 deposited in the Improvement Fund and by cross claim and counter claim, has petitioned the Court for instructions as to the use and disposition of the money.

7. There are no genuine issues of material fact with respect to plaintiffs' Motion for Summary Judgment and the foregoing facts and each of them are fully established under the principles of collateral estoppel by virtue of the holding of the United States Court of Appeals, Eighth Circuit, in the case of *Harris, et al. v. Union Electric Company,* reported at 787 F.2d 355 (8th Cir. 1986); *cert. den.,*

— U.S. — (10/6/86), as well as from the evidence offered in connection with the Memorandum, Order and Decree herein dated November 1, 1982, the findings in which are hereby reaffirmed by the Court, and the reasonable inferences therefrom:

8. Since the November 1, 1982 Order of the Court, counsel for plaintiffs have expended 283 hours of legal time, consisting of 279 hours by David L. Campbell and 4 hours by associates employed by him, which should be compensated at the same rates and in the same degree as set forth in said November 1, 1982 Order;

AND, the Court, having so found and determined, HEREBY CONCLUDES AND DECLARES THAT:

9. The Court has jurisdiction over the parties and the subject matter presented in Count I of the Third Amended Petition; and

10. The actions pleaded and presented in Count I of the plaintiffs' Third Amended Petition are properly the subject of a class action, and may be maintained as a class action by the plaintiffs, who will fairly and adequately protect and represent the interests of the Class as the Class Representatives; and

11. The Class to be represented in the maintenance of the actions presented and pleaded in Count I of the Third Amended Petition as a class action shall be all of the holders of those Bonds issued by defendant Union Electric Company as First Mortgage Bonds, 10-1/2% Series due March 1, 2005, as of November 21, 1978, the date of the Class Determination Order herein, and their transferees; and

12. There being no genuine issue as to any material fact, Summary Judgment is appropriate; and

13. The Prospectus and Registration Statement are misleading in that the Prospectus and Registration Statement:

A. Fail to disclose material facts necessary in order to make the statements contained in such documents not misleading; and

B. Implies, by the inclusion of a premium price list for general redemption of bonds, denominated as the "Regular Redemption Prices", that such premium prices would be paid for any regular or general redemption of bonds prior to maturity when, in fact, there was no circumstance when Defendant Union Electric would ever pay a Regular Redemption Price for Bonds; and

C. In denominating the price lists for bond redemptions as "Special Redemption Prices" and "Regular Redemption Prices", in the manner in which they did, misstated the prices which would in fact be applied to any general or regular redemption of Bonds and to any special or extraordinary redemption of Bonds; and

D. Fails to disclose the Article VIII, § 8 redemption right while at the same time disclosing the right to transfer Maintenance Fund cash to the Improvement Fund and to redeem Bonds in the Improvement Fund, thus misleading the Bondholders into believing that any redemption of Bonds using Maintenance Fund cash would be at premium prices when, in fact, the Article VIII, § 8 redemption right would permit Union Electric to use Maintenance Fund cash to redeem Bonds at par.

14. At the time of the issuance and sale of the Series 2005 Bonds, it was intended by Union Electric that Bondholders believe that the redemption features of the Series 2005 Bonds contained provisions that (i) under no circumstances was Union Electric to be able to redeem any of the Series 2005 Bonds prior to March 1, 1985, where monies for such redemption are obtained directly or indirectly from or in anticipation of borrowings by or for the account of Union Electric at an interest cost of 10.60% or less per annum; and (ii) that any redemption of Series 2005 Bonds prior to maturity would be at the Regular Redemption Prices (the premium price list), except as to the annual Improvement Fund contribution requirement, which could be used to redeem bonds at par (the Special Redemption Price of 100%); and

15. The provision in the Bond Contract permitting the use of cash in the Maintenance Fund to redeem Bonds under Article VIII, § 8 of the Composite Indenture, is specifically contrary to the intended belief that Union Electric attempted to engender in the purchasers of the Series 2005 Bonds at the time of their original issue and sale to members of the general public; and

16. The use by Union Electric of cash in the Maintenance Fund under the Article VIII, § 8 redemption device provided for in the Composite Indenture to redeem Series 2005 Bonds constitutes a course of business, or a device, scheme or artifice, that operates as a fraud upon the holders of the Series 2005 Bonds; and that, as such, the use of cash in the Maintenance Fund to redeem bonds at par under said Article VIII, § 8 redemption device, constitutes fraud and deceit, and constitutes a violation of § 17(a) of the 1933 Act and of § 323(a) of the 1939 Act.

17. Plaintiffs are entitled to recover an additional reasonable attorney's fee in the sum of $63,225.00 by virtue of the provisions of the Bond Contract contained in Article IX, § 12 of the Composite Indenture and for the same reasons as set forth in the aforesaid November 1, 1982 Order.

Having so found and determined, concluded and declared, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

18. Defendant Union Electric Company's Motion for Summary Judgment is hereby denied and plaintiffs' Motion for Summary Judgment is hereby sustained and Summary Judgment is hereby entered in favor of the plaintiffs and against the defendants Union Electric Company and Centerre Trust Company on Count I of the Third Amended Petition, and on the Counterclaims of defendants Union Electric Company and Centerre Trust Company; and Summary Judgment is hereby entered in favor of defendant Centerre Trust Company and against Union Electric Company on the Cross-claims of Centerre Trust Company and of Union Electric Company; and accordingly:

A. Defendants Union Electric Company and Centerre Trust Company, and each of them, individually or in consort with or by and through their officers, directors, agents, attorneys, servants, consorts and employees, are hereby permanently enjoined, restrained and prohibited from:

1. Redeeming or attempting to redeem, or aiding, abetting, assisting or participating in any redemption of any Series 2005 Bonds at a redemption price other than the Regular Redemption Price set forth on the reverse side of each Series 2005 Bond and in Section 3, Article I of the Indenture, except for Bonds redeemed for the Improvement

Fund in an amount not to exceed $700,000.00 in any one calendar year, and only then if redeemed with cash funds which are contributed directly to the Improvement Fund for Series 2005 Bonds by Union Electric as part of the annual contribution requirement under the provisions of Section 1, Article III of the Indenture; and

2. Withdrawing or using any monies from the Maintenance Fund or the Trust Estate under the Original Indenture, as supplemented by the Indenture and 1941 Indenture, for the purpose of redeeming said Series 2005 Bonds prior to maturity at other than at the Regular Redemption Prices (the premium price list); and

B. The Memorandum, Order and Decree entered on November 21, 1982 is reaffirmed and confirmed, and the judgment entered thereby shall be effective as of, and shall draw interest from, said November 21, 1982 date; and Petitioners shall have execution therefor; and

C. Judgment is hereby entered in favor of David L. Campbell, Petitioner, and against Union Electric Company on Plaintiffs' Supplemental Application for Fees in the additional sum of $63,225.00, and Petitioner shall have execution therefore; and

D. The Court retains jurisdiction to enforce this Decree and to determine and provide for notice hereof to be given to all members of the Class; and

E. All costs of this proceeding are adjudged against defendant Union Electric Company.

F. Having disposed of all matters with relation to the Class designated in the Class Determination Order, and there being no other claims on behalf of such designated

Class remaining undisposed of, this Memorandum, Order and Decree, together with the aforesaid November 21, 1982 Memorandum, Order and Decree, is hereby designated to be a final and appealable Order, Judgment and Decree.

Entered at Clayton, Missouri in St. Louis County, Missouri, this 6th day of January, 1987.

/s/ James R. Hartenbach
Circuit Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

HAROLD HARRIS, CONTINENTAL CASUALTY COMPANY and NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, etc.,	)	
Plaintiffs,	)	Cause No. 408,427
vs.	)	Division No. 10
UNION ELECTRIC COMPANY and CENTERRE TRUST COMPANY, et al.,	)	
Defendants.	)	

MEMORANDUM, ORDER AND DECREE

(Filed November 1, 1982)

This matter is before the Court on plaintiffs' Amended Application for Fees and Expenses and the Union Electric Company's Application for Reasonable Attorneys' Fees, Expenses and Costs.

Being duly advised in the premises, the Court hereby FINDS AND DETERMINES THAT:

1. Plaintiffs, as the owners and holders in the aggregate of $4,012,000 principal amount of Series 2005 Bonds and representing a class consisting of all of the holders of the Series 2005 Bonds and their transferees, have brought suit challenging, inter alia, Union Electric's right to redeem the Series 2005 Bonds. By order dated November

21, 1978, this action was certified as a Class Action against defendants Union Electric Company and Centerre Trust Company (but not against defendants Merrill Lynch, Pierce, Fenner & Smith, Inc., Bache, Halsey, Stuart & Shields, Inc., or White, Weld & Co., Inc., hereinafter "the Underwriters"). Those findings are hereby reaffirmed, ratified and confirmed.

2. On March 26, 1975, defendant Union Electric Company ("Union Electric") issued and sold an aggregate of $70,000,000 of the Series 2005 Bonds to the general public by means of a Prospectus (Exhibit 6). The Series 2005 Bonds were issued pursuant to, inter alia, the Composite Indenture (Exhibit 1) and the Supplemental Indenture dated March 1, 1975 (Exhibit 2).

3. Section 12 of Article IX of the Composite Indenture provides in part that the Court "may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant."

4. The terms of the Series 2005 Bonds were negotiated between Union Electric and the Underwriters, and it was agreed that, under existing conditions, the Series 2005 Bonds would be marketable and attractive to the public if they provided a call protection consisting of (i) a ten-year protection against refunding at a lower interest rate, and (ii) a provision that a general redemption of Series 2005 Bonds prior to maturity would be at a premium, namely, the Regular Redemption Price. The price of the Series 2005 Bonds was predicated, in part, upon the existence of such a call protection. At the time of the issue and sale

of the Series 2005 Bonds, Union Electric intentend that the Bondholders believe that they had such a call protection and that the aforesaid call protection applied equally to special redemptions as well as to regular redemptions.

5. On April 14, 1978, Union Electric made short term borrowings by the issuance of $20,000,000 in commercial paper notes through Lehman Commercial Paper, Inc., at an average rate of interest of 6.91% per annum; by the issuance of $9,975,000 in commercial paper notes through Salomon Brothers at an average rate of interest of 6.85% per annum; and by the issuance of $20,000,000 in promissory notes to various commercial banks at an average rate of interest of 8% per annum. None of the aforesaid short term borrowings were authorized by the Federal Power Commission, now known as the Federal Energy Regulatory Commission (FERC), nor by any other regulatory authority. On April 14, 1978, the only purpose for which Union Electric had authority from the FERC to make short term borrowings was to finance its construction program. The redemption of bonds, and, in particular, the redemption of Series 2005 Bonds, is not a part of Union Electric's construction program.

6. The aforesaid short term borrowings were made and used by Union Electric for the purpose of providing the sum of $49,887,000 which was deposited with the Trustee on April 14, 1978, in the Improvement Fund and in the Maintenance Fund to redeem a like amount of the Series 2005 Bonds. But for the aforesaid short term borrowings, Union Electric could not and would not have attempted to redeem the Series 2005 Bonds. Although instructed by Union Electric to do so, the Trustee refused to redeem the Series 2005 Bonds without first being af-

forded a prior judicial determination that Union Eelctric had the right to do so. On June 19, 1978, Union Electric announced that it was cancelling its plan to redeem the Series 2005 Bonds stating that it was effectively prohibited from proceeding with the redemption by plaintiff's lawsuit. Union Electric withdrew the $49,187,000 previously deposited in the Maintenance Fund, although it has stated, and asserts in its pleadings before the Court, that it intends to make similar deposits and to reactivate its redemption plan if they deem circumstances appropriate to do so. The effective interest cost to Union Electric on the short term borrowings which generated such monies was always less than 10.60% per annum.

7. The cancellation by Union Electric of its plan to redeem the Series 2005 Bonds was brought about as a direct result of the efforts of the plaintiffs' attorneys, and the continued prosecution of the instant action has effectively prevented Union Electric to date from redeeming the Series 2005 Bonds.

8. Union Electric would not redeem any Series 2005 Bonds unless it first determined that it would be economically feasible for it to do so, and any monies for bond redemptions would have to be ultimately provided by a new issue of long term corporate bonds. It would never be economically feasible for Union Electric to redeem Series 2005 Bonds unless the effective interest rate on the new long term bonds was at least one (1) percentage point less than the effective interest rate of 10.60% of the Series 2005 Bonds. Long term corporate bond interest rates for Union Electric borrowings will not drop below 10% per annum prior to March 1, 1995, and will not drop below 10½% per annum prior to March 1, 1985. Hence, it would

not be economically feasible at any time prior to March 1, 1995, for Union Electric to redeem Series 2005 Bonds, and Union Electric will not redeem any Series 2005 Bonds, prior to March 1, 1995.

9. Since late in 1979, Union Electric has considered it to be highly unlikely that it would ever be economically feasible to redeem Series 2005 Bonds prior to March 1, 1985; and since the date that Union Electric came to such conclusion, its attorneys have expended a minimum of 2356 hours of time on this and companion litigation for which Union Electric has been billed and paid $193,950 in fees and $23,194.30 in expenses.

10. The computation of a reasonable attorneys' fee which is customarily employed in complex litigation matters such as the instant case is based upon a reasonably determined multiplier which is applied to the Lodestar calculation. The "Lodestar" is a calculation of a fee which is based solely on reasonable hourly rates applied to the number of hours expended. Plaintiffs' Attorneys have reasonably expended a total of 3,135 hours of time (including Associate Attorneys and Paralegals who were employees of Mr. Campbell). The total hours expended per attorney, the reasonable hourly rate to be applied, and the calculation of the Lodestar fee is as follows:

Person Performing Service	Time Spent	Hourly Rate	Lodestar Fee
Edward W. Fredrickson	440.0 hours	$150.00	$ 66,000.00
David L. Campbell	2429.2 hours	150.00	364,380.00
Stuart J. Radloff	8.8 hours	90.00	790.00
Associate Attorneys*	143.0 hours	75.00	10,725.00
Paralegals*	114.0 hours	40.00	4,560.00
Total Lodestar Fee			$446,455.00

11. The reasonable fee in this case is determined by applying a multiplier to the Lodestar fee calculation. A reasonable multiplier to be applied in this case is 1.5, taking into account the following factors:

(a) This case involves complex questions of law and fact which are matters of a novel and difficult nature. Plaintiffs have prosecuted this action without the benefit of assistance from any other person or public body. A high degree of skill is a prerequisite to the proper and adequate representation of the interests of the plaintiffs and of the class members in litigation such as this. Counsel for plaintiffs possess the qualifications and ability demanded by the instant litigation.

(b) Taking into account the amounts involved and the results obtained, a reasonable multiplier customarily used in allowing attorneys' fees in litigation of the nature and complexity of the instant case is between 1 and 2 times the Lodestar calculation. A reasonable fee which would be customarily charged, taking into account the amounts involved and the results obtained, is approximately $690,000.

(c) In stopping the attempted redemption of the Series 2005 Bonds, plaintiffs' attorneys benefited the Bondholders by preserving to the Bondholders the differential interest rate which they would have lost had the Series 2005 Bonds been redeemed. The difference between the proposed redemption of approximately $50,000,000 of Series 2005 Bonds at the special price of par, and the then applicable Regular Redemption Price, was 9.42%, or a total of $4,710,000.00. Had the Series 2005 Bonds been redeemed at the time and in the manner as was attempted by Union Electric in April, 1978, the Bondholders would

have been limited to a yield of 9.35% per annum on any comparable investment. The total interest income preserved for the benefit of the Bondholders is $895,000 per year, or a total of $12,880,000 through March 1, 1995.

(d) The services performed by plaintiffs' counsel have been of high caliber.

AND, the Court, having so found and determined, HEREBY CONCLUDES AND DECLARES:

12. The Court has jurisdiction over the parties and the subject matter presented by Plaintiffs' Amended Application for Fees and Expenses and the Union Electric Company's Application for Reasonable Attorneys' Fees, Expenses and Costs; and

13. Union Electric's attempt to redeem the Series 2005 Bonds and its defense of the instant action was not in good faith because the short term borrowings which initiated the course of events from which this litigation arose were unlawful and illegal *ab initio;* and because over 63% of the total attorneys' fees and over 79% of the total expenses charged to Union Electric by its attorneys, and paid by it, were incurred after the time that Union Electric became convinced that it was highly unlikely that they would ever be able to use the right to redeem Series 2005 Bonds that they were seeking to establish in this litigation.

14. Plaintiffs' action was brought and maintained in good faith.

15. Plaintiffs are entitled to recover a reasonable attorneys' fee in the sum of $696,000 and their expenses of suit in the sum of $23,937.39 by virtue of the provisions of the Bond Contract contained in § 12 of Article IX of the Composite Indenture, and because of the fact that the

plaintiffs and their attorneys have produced a substantial benefit for the Bondholders for which they are entitled to be compensated under general equitable principles.

Applying these principles, the Court having so found and determined, concluded and declared, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

16. Judgment is hereby entered in favor of petitioners, David L. Campbell and Edward W. Fredrickson, and against defendant Union Electric Company, on Plaintiffs' Amended Application for Fees and Expenses, in the sum of $696,000 as and for attorneys' fees, and in the sum of $23,937.39 as and for reimbursement for expenses of suit advanced and incurred by them, or a total of $719,937.39, and petitioners shall have execution therefor; and

17. Judgment is hereby entered in favor of plaintiffs and against defendant Union Electric Company on defendant Union Electric Company's Application for Reasonable Attorneys' Fees, Expenses and Costs; and

18. All costs of this proceeding are adjudged against defendant Union Electric Company, and plaintiffs shall have execution therefor; and

19. The foregoing provisions of this Memorandum, Order and Decree are hereby designated to be a final and appealable Order, Judgment and Decree.

ENTERED at Clayton, Missouri, in St. Louis County, this 1st day of November, 1982.

/s/ D. Luten, Jr.
Judge, Division 10 St. Louis
County Circuit Court

APPENDIX F

HAROLD HARRIS, et al.,	)	
	)	
Plaintiffs-Respondents	)	
	)	
and	)	
	)	
DAVID L. CAMPBELL and ESTATE OF EDWARD W. FREDRICKSON,	)	
	)	
Petitioners-Respondents	)	Appeal No. 70374
vs.	)	
	)	
UNION ELECTRIC COMPANY,	)	
	)	
Defendant-Appellant	)	
	)	
and	)	
	)	
CENTERRE TRUST COMPANY, formerly ST. LOUIS UNION TRUST COMPANY,	)	
	)	
Defendant-Appellant	)	

MOTION FOR REHEARING

Come now Plaintiffs-Respondents and, pursuant to Civil Rule 84.17, move the Court for a rehearing on the grounds that the following material matters of law and fact have been overlooked or misinterpreted by the Court's opinion, to wit:

1. The statement at p. 2 of the Opinion that "several bondholders filed suit seeking declaratory, injunctive, and monetary relief for a class of bondholders" is inconsistent with the statement at p. 4 of the Opinion that only "plaintiff Harold Harris filed suit"; and at p. 5, that after Union

Electric had abandoned its redemption plan, "Continental Casualty Company and National Fire Insurance Company of Hartford came forward as bondholders and were added as named plaintiffs in the suit *originally filed by Harris* (emphasis supplied)"; all of which are inconsistent with the Opinion's finding at pp. 24-5 that the Bond Contract provision authorizing attorneys' fees does not apply here because it is a "suit *instituted by* [a] bondholder, or group of bondholders, holding in the aggregate more than ten per cent (10%) in principal amount of the Bonds outstanding" (emphasis supplied); the actual fact of the matter being that this suit was *instituted by* Harold Harris alone, a holder of $12,000 bonds out of a total of $70,000,000 outstanding, and that, even if it could be said that the suit was instituted by Continental Casualty Company and National Fire Insurance Company of Hartford (albeit they did not join as party plaintiffs until several months after the suit had been *instituted*), only $4,012,000 in bonds are represented by Harris and the two insurance companies, a percentage holding of approximately 5.73%.

2. The statement at p. 2 of the Opinion that "the order enjoined Union Electric from redeeming the Series 2005 bonds at par value from money deposited with its trustee, Centerre", and similar statements at p. 12 about "the use of cash in the Maintenance Fund for redemption", and at p. 13 about the order enjoining redemption "at a redemption price other than at the premium price", and that the order "precludes redemption at par and from using any money from the Maintenance Fund for the purpose of redeeming bonds prior to maturity at other than the premium price"; all evince a misinterpretation and fundamental lack of understanding of the nature of the in-

junction, which merely prohibits Union Electric from utilizing the undisclosed Article VIII, § 8 redemption right that the federal court held that it had fraudulently acquired.

3. The statement at p. 7 of the Opinion that the "Court of Appeals, Eastern District, found the fee award faulty on two grounds: first, plaintiffs received no tangible recovery, and second, Union Electric was granted summary judgment in *Harris I*, completely misinterprets the holding in *Harris II*, which merely held that the fee award was not a final and appealable order, without any findings on the merits being made by the Court of Appeals.

4. The statement at p. 5 of the Opinion that Harris and the bondholders "bought the bonds in reliance on solid call protection on the bonds for ten years"; at p. 9, characterizing the nature of plaintiffs' complaint in the federal case; at p. 10, characterizing the plaintiffs' contentions in the federal case concerning the holding in *Harris I;* at p. 11, characterizing the holding of the 8th Circuit at 787 F.2d 355; at p. 12, concerning the findings of the trial court about the misleading nature of the prospectus; at p. 22, that the class in this case is "most interested in pursuing injunctive relief to forestall a bond redemption prior to March 1, 1985, the end of the 'no-call' period", and characterizing the bondholders only as having purchased believing the bonds could not be called before March 1, 1985; all misinterpret the thrust of plaintiffs' position in this case, and overlook the fact that the plaintiffs bought the bonds also in reliance on the existence of a meaningful premium price list during the life of the bonds (both before and after March 1, 1985), and that the plaintiffs make no contention in this case about, nor does the injunction ad-

dress in any way, the issue of whether the bonds are callable prior to March 1, 1985, but rather solely addresses the question of whether the plaintiffs are entitled to the benefit of the premium price list contained in the Bond Contract, and whether Union Electric should be enjoined from using its fraudulently obtained undisclosed Article VIII, § 8 redemption right which the federal court held renders the premium price list "meaningless" and a "sham".

5. The statement at p. 6 of the Opinion characterizing the holding in *Harris I* as "permitting Union Electric to call the bonds by special redemption as it had planned", at p. 10 characterizing the holding in *Harris I* in similar language, and at p. 18 that "the federal jury was instructed that Union Electric could redeem the bonds", all misinterpret the holding of the Court of Appeals in *Harris I* and create the false impression that it has been judicially determined that Union Electric could redeem the bonds, and overlooks the fact that *Harris I* only found that Union Electric had a redemption right under Article VIII, § 8 as it contended, but made no ruling, and in fact specifically refrained from making any ruling, that Union Electric could in fact redeem the bonds in the face of the fraud and prospectus disclosure issues that remained to be decided.

6. The statement at p. 19 of the Opinion that the plaintiffs, in pursuing their federal damage claims, "chose to affirm the contract", is inconsistent with the statement at p. 17 of the Opinion that plaintiffs' suit in federal court was for damages for fraudulent inducement to enter into the contract to purchase the bonds; and the statements at p. 19 of the Opinion characterizing the nature of plaintiffs' federal action as choosing "to affirm the contract and to

sue for damages", and characterizing the instant action as disaffirming "the contract as written" and seeking "an injunction to conform the contract provisions to what plaintiffs originally believed them to be"; all misinterpret the nature of the federal suit and the nature of the injunctive relief granted herein, and overlook the fact that plaintiffs' federal suit was an action for damages for fraudulent inducement to enter into the bond contract, and plaintiffs' suit in equity is on the contract and has the effect of requiring a specific performance by Union Electric of the premium price list which was a part of the bond contract from the beginning, and, as such, the actions are not repugnant to one another, are not inconsistent, and do not provide plaintiffs with any double recovery, so that the Opinion misapplied the doctrine of election of remedies.

7. The statement at p. 10 of the Opinion in footnote 9 is incorrect in that the fee application filed with the federal court and considered by it, and in response to which its September 30, 1985 fee and expense awards were made, did not rely in any way on any provision of the bond contract, and is further incorrect in that plaintiffs' counsel has not received more than one million dollars in fees and costs from the federal judgment fund as stated, but that the total fees allowed from the federal judgment fund were $813,276.45, and that there remains today to be paid to counsel from the judgment fund approximately $200,000; and that it is arbitrary and unreasonable and a violation of due process to decide the rights of litigants based in whole or in part on the amount of money that their attorneys have made or might make in a particular case, and such matters were not properly before the Court.

8. The Opinion, in applying the doctrine of election of remedies, overlooks the fact that Union Electric did not timely assert the affirmative defense of election of remedies in the trial court, as it was required to do, so that such matters were not properly before the Court.

9. The statement at p. 14 of the Opinion referring to Union Electric's contention that "the plaintiff's (sic) class was improperly certified", and the gratuitous discussion in footnote 10 on p. 15 of the Opinion concerning class certification issues, all overlook the fact that Union Electric did not present any issues to the trial court nor to the Court of Appeals concerning the propriety of the certification, nor seeking the decertification, of the class; and overlook the fact that the certification of this class was done by and with the consent of Union Electric, so that it is estopped to raise such issues for the first time on transfer to this Court, and that such issues were not properly before the Court.

10. The statement at p. 18 of the Opinion that "if Union Electric were to redeem the bonds presently, there can be no additional injury for which the federal plaintiffs have not already been compensated", and that the federal plaintiffs "have received an adjusted purchase price for a bond that can be redeemed at par, but now seek a bond that cannot be redeemed at par under any circumstances", misinterprets both the measure of damages in the federal case and the nature of the injunction in this case, and overlooks the facts that (i) the federal damage award was not "for a bond that can be redeemed at par", but was for a difference in value between a bond with protection against lower interest cost refunding for ten years and one where the refunding protection afforded

was found to be a "sham"; (ii) that no measure of damages was submitted to the federal jury concerning the loss of the premium price by a redemption at par, nor the loss of future interest payments caused by a redemption and lower interest cost refunding, because those matters had not happened and the federal court held that any such matters that might occur after the April 11, 1978 announcement date were irrelevant and immaterial and not involved in the federal case, so that no compensation for such damages has ever been considered, much less awarded; and (iii) the injunction does not prohibit, by its words or effect, the redemption of the bonds "at par under any circumstances," but merely enjoins the use of the fraudulently obtained undisclosed Article VIII, § 8 redemption right, and the consequent rendering of the premum price list to be "meaningless" and a "sham", as so held by the federal court.

11. The characterization of plaintiffs' public policy argument at pp. 19-20 of the Opinion as seeking "a punitive measure" where "they have otherwise been made whole", and that "an injunction will not lie where the plaintiff has an adequate remedy at law", and the statement at p. 22 of the Opinion that "to enjoin Union Electric from ever redeeming the bonds before maturity is punitive"; all misinterpret the nature and basis of the relief sought, and overlook the established facts that: (i) once equity attaches its jurisdiction it can afford complete relief, even to the extent of ordering relief which coincides with, or solely consists of, money damages which in itself is an adequate remedy at law; (ii) it is an established equitable principle that, in formulating equitable relief, a wrongdoer is not to be permitted to derive benefit from

his wrongdoing, and that such principle is remedial in nature, not punitive; (iii) without the establishment of the premium price list vis-a-vis the prohibition of Union Electric using the fraudulently obtained undisclosed Article VIII, § 8 redemption right, the plaintiffs have not "been made whole"; and (iv) the injunction does not "enjoin Union Electric from ever redeeming the bonds before maturity", but rather permits all bond redemptions at both the premium prices and at par that the indentures permit, except redemptions utilizing the fraudulently obtained undisclosed Article VIII, § 8 redemption right.

12. The statement at pp. 25-6 of the Opinion that an award of attorneys' fees in this case would be "unprecedented" overlooks the fact that § 323(a) of the Trust Indenture Act of 1939 provides for the recovery of attorneys' fees and costs in cases such as this, and overlooks a body of law that establishes that where an attorney for a class produces a substantial result for the benefit of the class, and no tangible fund exists, attorneys' fees can be assessed against the opposing party under general equitable principles.

13. The statement at p. 25 of the Opinion that "the present claim is not premised on rights or remedies provided by the indenture, overlooks the fact that the effect of the injunction is to prevent the fraudulently obtained undisclosed Article VIII, § 8 redemption device from rendering the premium price list "meaningless" and a "sham", as the federal court held that it does; and that the bondholders are entitled to the benefit of the premium price list as part of the bond contract, as provided in the 1975 Supplemental Indenture and on the reverse of the

bond certificate (which itself is created by and provided for in the Indenture).

14. The statement at p. 26 of the Opinion that "prejudgment interest cannot be awarded on an interlocutory judgment" misinterprets the case of *Crawford v. Smithy*, 470 S.W.2d 529, 533 (Mo. banc 1971), in that said case does not at any point discuss prejudgment interest, nor are the terms "prejudgment interest" or "interlocutory judgment" to be found in the Opinion in said case; and overlooks the clear and unambiguous language of § 408.040, V.A.M.S., and of § 512.160 V.A.M.S., that interest is to be paid on all judgments (without distinction between interlocutory judgments and final judgments) from the date that they are rendered, and overlooks the fact that, even in the absence of a statute, the award of prejudgment interest is a matter within the sound discretion of the trial court; and overlooks the fact that Union Electric did not attack the award of prejudgment interest before the Court of Appeals so that any objection thereto was waived and the matter was not properly before this Court.

15. The Opinion violates Article VI, clause 2, the Supremacy Clause, of the Constitution of the United States in that:

> (a) The statement at p. 19 of the Opinion that the plaintiffs' contention that Union Electric obtained the Article VIII, § 8 "redemption right through fraud . . . are without merit" and that plaintiffs, in pursuing their federal damage claims are estopped to suggest that Union Electric would be acting wrongfully if it now exercised the fraudulently obtained undisclosed Article VIII, § 8 redemption rights, refuses to enforce and apply, and in fact repudiates and ignores, the holdings of the U.S. Court of Appeals in *Harris, et al.*

v. Union Electric Company, 787 F.2d 355 (8th Cir. 1986), which are the established law of this case, so as to provide the unconscionable result that a person determined to have committed federal securities fraud is allowed to reap the full benefits of its fraudulent conduct.

(b) The Opinion refuses to enforce and apply the provisions of § 302(a) and 302(b) of the Trust Indenture Act of 1939, and the decisions and interpretations of the federal courts concerning said federal laws, so as to severely curtail the utilization of class actions to redress violations of the federal securities laws, contrary to the expressed public policy underlying the Act, and so as to provide the unconscionable result that a person determined to have committed federal securities fraud be allowed to reap the full benefits of its fraudulent conduct.

(c) The Opinion refuses to enforce and apply the provisions of § 315(c) of the Trust Indenture Act of 1939, and the decisions and interpretations of the federal courts concerning said federal laws, so as to interpret Article IX, § 12 of the Indenture so as to deny the recovery of attorneys' fees in class actions contrary to the intent and purpose of the Act.

(d) The Opinion refuses to enforce and apply the provisions of § 17(a) of the Securities Act of 1933 and the provisions of § 323(a) of the Trust Indenture Act of 1939, and the decisions and interpretations of the federal courts concerning said federal laws, so as to provide the unconscionable result that a person determined to have committed federal securities fraud be allowed to reap the full benefits of its fraudulent conduct.

(e) The Opinion misapplies the state common law rule regarding election of remedies so as to deny the right of persons who had opted out of the federal damage class to pursue their causes of action under federal securities laws in the state courts, where they had a clear federally established right to do so.

(f) The Opinion misapplies the state common law rule regarding election of remedies, misinterprets the common law rule concerning the effect of an adequate remedy at law on the right to equitable relief, so as to deny the right of all of the class members to pursue their causes of action under the federal securities laws in the state courts, where they had a clear federally established right to do so.

16. The Opinion denies the class members who opted out of the federal class their freedom of petition and free access to the courts with respect to their federal securities act claims, as guaranteed by the First Amendment to the U.S. Constitution and the due process clause of the Fourteenth Amendment to the U.S. Constitution, and nullifies the federal class action "opt-out" procedure in violation of Article VI, clause 2, the Supremacy Clause, of the Constitution of the United States.

17. The Opinion denies all of the class members their freedom of petition and free access to the courts with respect to their federal securities act claims, as guaranteed by the First Amendment to the U.S. Constitution and the due process clause of the Fourteenth Amendment to the U.S. Constitution.

CAMPBELL & CAMPBELL

By /s/ David L. Campbell
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Attorneys for Plaintiffs-Respondents

(Proof of Service Omitted in Printing)

APPENDIX G

(SEAL)

CLERK OF THE SUPREME COURT
STATE OF MISSOURI

Post Office Box 150
Jefferson City, Missouri 65102
March 14, 1989

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mr. Francis D. Duda
Mr. Lawrence C. Crahan
Mr. Jordon B. Cherrick
611 Olive, Suite 1900
St. Louis, Missouri 63101

Re: Harold Harris, et al. and David L. Campbell and Estate of Edward W. Fredrickson and David L. Campbell vs. Union Electric Company and Centerre Trust Company, formerly St. Louis Union Trust Company, No. 70374

Gentlemen:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled. Billings, C.J., not participating. Covington, J., not participating because not a member of the Court when cause was submitted.

Defendant-Appellant Union Electric Company's motion for partial rehearing or in the alternative for modification of opinion overruled. Opinion modified on Court's own motion. Billings, C.J., not participat-

ing. Covington, J., not participating because not a member of the Court when cause was submitted."

Very truly yours,

/s/ Thomas Simon
Clerk

cc: Mr. David L. Campbell
Mr. David S. Slavkin

APPENDIX H

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1252

Harold Harris, et al.,
Appellees,

vs.

Union Electric Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: October 16, 1985
Filed: March 24, 1986

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Harold Harris, Continental Casualty Company, and National Fire Insurance Company of Hartford, individually and on behalf of a class of bondholders, brought this action against Union Electric Company alleging violations of section 10(b) of the Securities Exchange Act and of Rule 10b-5 of the Securities Exchange Commission with respect to the issuance and propos-

ed call of the First Mortgage Bonds of Union Electric Company. The district court[1] entered judgment on a jury verdict awarding the class $2,716,240. Union Electric Company appeals, and for reversal it argues that 1) the plaintiffs' claims are barred by the statute of limitations; 2) insufficient evidence exists to sustain the jury's verdict on the plaintiffs' section 10(b) and Rule 10b-5 claims; 3) the court erroneously instructed the jury with respect to liability and damages; and 4) the court erroneously excluded evidence regarding market value and interest payments made after the plan to call the bonds was cancelled. For the reasons discussed below, we affirm the district court's judgment.

I. BACKGROUND

In March of 1975, Union Electric Company (UE) issued $70,000,000 of its First Mortgage Bonds, 10½ Series due March 1, 2005 pursuant to a Supplemental Indenture. The bonds had a par value of $1,000, and were sold to a group, or syndicate, of eighty-eight underwriters, who offered the bonds to the public. By April 9, 1975, all of the bonds had been sold to the public, and the syndicate was dissolved. Harris purchased twelve bonds at 100% of par, or a total price of $12,000. Continental purchased 1,000 bonds in two transactions — 500 bonds at 98.25% of par, or $491,000, and 500 bonds at 102% of par, or $510,000. National purchased 3000 bonds in three transactions — 1,000 bonds at 100.55% of par, or $1,005,000, 1,500 bonds at 100.5625%, or $1,508,437.50, and 500 bonds at 100.25%, or $501,250.

On April 11, 1978, UE publicly announced its plan to call $50,000,000 of the Series 2005 Bonds. As a result of the announcement, the market value of the bonds plunged from approximately 112 to 101, or $120 per bond. To implement the plan, UE incurred short-term debt of $49,887,000 in cash at an

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[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

interest rate of less than 10.60%, which it deposited with its mortgage trustee; $49,187,000 was placed in UE's Maintenance Fund and $700,000 was placed in its Improvement Fund. The short-term debt was to be replaced by a private placement of a long-term mortgage bond issue at 9.35%. Although UE instructed the trustee to call the Series 2005 Bonds, the trustee refused to do so without judicial approval because it questioned the legality of the plan to call the bonds through the Maintenance Fund. On May 9, 1978, the plaintiffs in this suit instituted a state court action in the Missouri State Circuit Court against UE and its trustee, seeking injunctive and declaratory relief. The purchasers of the 9.35% bonds (the bonds that were to be sold to replace the short-term debt) refused to buy when they learned of the state court action. Consequently, on June 19, 1978, UE abandoned its plan, and withdrew the cash from the Maintenance Fund. In December of 1979, the Missouri Circuit Court granted the plaintiffs' motion for summary judgment. The Missouri Court of Appeals reversed, construing the indentures and the bond contract to allow UE to call the Series 2005 Bonds as it had planned. *Harris v. Union Electric Co.*, 622 S.W.2d 239, 246-50 (Mo. Ct. App. 1981). The court of appeals did not rule on the issue of whether the prospectus for the Series 2005 Bonds adequately disclosed the bonds' call protection because it held that issue was not properly before the court. *Id.* at 244. The prospectus, however, as well as the plan, is the subject of the present action, which the plaintiffs instituted in the federal district court on February 11, 1980.

The plaintiffs' amended complaint alleged violations of section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j (b) (1982), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5 (1985). Specifically, the plaintiffs claimed that the prospectus for the Series 2005 Bonds misrepresented and omitted material facts regarding the call-protection provisions of the bond contract, and that the attempted plan to call the bonds constituted a scheme to defraud the bondholders

because UE knew the plan was "contrary to and prohibited by the terms of the prospectus." The district court certified the class pursuant to Fed. R. Civ. P. 23(b) (3). The court's amended definition of the class included "[a]ll persons, companies, and corporations who held First Mortgage Bonds of Union Electric Company, 10½% Series, due March 1, 2005, as of the public redemption announcement by Union Electric Company on April 11, 1978." The class consisted of 1,500 bondholders, holding a total of 67,906 bonds. After a bifurcated trial on the issues of liability and damages, the jury returned verdicts in favor of the plaintiffs, awarding them $2,716,240. The court entered its judgment in accordance with the verdicts, and UE appealed.

II. DISCUSSION

A. Statute of Limitations

UE contends that the plaintiffs' claims are barred by the two-year statute of limitations set forth in section 409.411(e) of the Missouri Revised Statutes. UE argues that the claims are untimely because this action was commenced five years after the bonds were sold, and three years after several plaintiffs learned of a "similar plan" implemented by Florida Power & Light Company (FP & L). Although UE correctly identifies the appropriate statute of limitations, its argument must fail. In *Morris v. Stifel, Nicolaus & Co.*, 600 F.2d 139, 146 (8th Cir. 1979), the court held that section 409.411(e) is the appropriate statute of limitations for section 10(b) and Rule 10b-5 actions commenced in Missouri federal courts. It is well established, however, that the limitations period is tolled until the fraud is discovered or, upon reasonable inquiry, when it should have been discovered. *Id.* at 140 n.7 (citing *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970)). *See also Koke v. Stifel, Nicolaus & Co.*, 620 F.2d 1340, 1343 (8th Cir. 1980). Although the bonds were sold in 1975, the plaintiffs did not discover the fraud until UE announced its plan

to call the bonds on April 11, 1978. Furthermore, in these circumstances, a reasonable person holding UE's Series 2005 Bonds would not have discovered the fraud simply by learning in 1977 that FP & L announced a plan to redeem similarly issued bonds. Indeed, several experts, including several UE officials, were not aware of the possibility of UE employing such a plan with respect to the Series 2005 Bonds until long after FP & L implemented its plan. Therefore, we hold that the plaintiffs' action is not barred by the statute of limitations.[2]

B. Rule 10b-5

The plaintiffs' amended complaint alleged that UE's conduct violated section 10(b) and Rule 10b-5 in two respects, which they describe as disclosure fraud and transaction fraud. First, UE committed disclosure fraud when it misrepresented and omitted material facts in its prospectus concerning redemption and refunding rights. Second, UE engaged in a course of business and employed a device, scheme, or artifice to defraud, constituting the transaction fraud, when it borrowed funds at an interest rate lower than 10.60%, deposited the funds in the Maintenance Fund, instructed the trustee to call the Series 2005 Bonds, and publicly announced its plan to call the bonds, causing the market price of the bonds to plummet.

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[2] UE also contends that the court's amended definition of the class erroneously operated retroactively to include parties and claims otherwise barred by the two-year statute of limitations. The disctrict court has "broad discretion in determining whether a class action may be maintained, and its determination will not be overturned absent a showing that it abused that discretion." *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551 (1974), the Court stated that "the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as the named plaintiffs." We hold that the claims of those members who were subsequently added to the class as a result of the court's redefinition are not barred by the statute of limitations because the named plaintiffs commenced the action within the applicable time period.

UE contends that the evidence was insufficient to support a jury verdict for damages pursuant to Rule 10b-5 because no probative evidence was submitted to establish materiality, reliance, damages, or scienter with respect to the class in general, and specifically, with respect to those members who held bonds on April 11, 1978 (the date the plan was announced), but who did not purchase their bonds in 1975.[3] UE argues that the plaintiffs' proof that UE officials were unaware of the possibility of calling the bonds until 1977, after FP & L implemented its plan, negates any allegation of scienter at the time the bonds were issued in 1975. UE claims that it could not have made a conscious effort to mislead investors in 1975 about the possibility of a plan that it was unaware existed until 1977. UE also argues that the plaintiffs failed to establish materiality. Although evidence was submitted showing that call-protection provisions in general are material, UE contends that the plaintiffs failed to show that an otherwise worded provision in the prospectus would have caused an average buyer to make a different investment decision. In fact, it is UE's position that the prospectus clearly disclosed UE's right to call the bonds in the manner in which the plan provided. It is also UE's position that those members of the class who held bonds on the date the plan was announced, but who did not purchase their bonds in 1975, could not have relied on the misrepresentations and omissions of material fact allegedly made by UE in 1975. Therefore, UE argues, those members could not prove fraudulent conduct, materiality, or reliance. UE also contends that the class members as well as the named plaintiffs were not damaged. UE argues that because the plan was cancelled before any bonds were selected for call, bondholders did not sustain a loss. The

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[3] With the few exceptions that we address in our discussion, UE's arguments under its first, second, and third brief points can be characterized as challenging the sufficiency of the plaintiffs' evidence to prove their section 10(b) and Rule 10b-5 claims.

evidence showing that the market value of the bonds dropped twelve points after the plan was announced, but before it was cancelled, does not measure a loss by the bondholders.

Our review of these issues is governed by the "sufficiency of the evidence" standard. Factual issues determined by the jury will not be reversed by this court when the verdict is supported by substantial evidence in the record. *See Mizell v. United States*, 663 F.2d 772, 776 (8th Cir. 1981); *Ozark Airlines, Inc. v. Larimer*, 352 F.2d 9, 11 (8th Cir. 1965). Although the plaintiffs argue that two separate instances of fraud exist — disclosure fraud and transaction fraud — we hold that the evidence is sufficient for the jury to have found that UE's entire conduct from March, 1975 to April, 1978 concerning the Series 2005 Bonds constituted a course of business and scheme or artifice which operated as a fraud on the bondholders.

Pursuant to section 10(b) of the 1934 Securities Exchange Act, the Securities Exchange Commission promulgated Rule 10b-5, which proscribes fraudulent conduct in connection with the purchase or sale of securities. *See St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040, 1047 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978).[4]

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[4] Section 10 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange —
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1982). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the

To succeed in a private action pursuant to Rule 10b-5, a plaintiff must establish 1) that the defendant acted in a manner prohibited by the Rule, whether it be that the defendant employed a device, scheme, or artifice to defraud, made misrepresentations or omissions of material fact, or engaged in acts, practices, or courses of business that operate as a fraud or deceit; 2) causation, often analyzed in terms of materiality and reliance; 3) damages; and 4) that the fraudulent activity occurred in connection with the purchase and sale of a security. *See Austin v. Loftsgaarden,* 675 F.2d 168, 176-80 (8th Cir. 1982); 17 C.F.R. § 240.10b-5 (1985). A finding of scienter, that is, an "intent to deceive, manipulate, or defraud," is also a prerequisite to recovery under section 10(b) and Rule 10b-5. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976).

1. Prohibited Conduct

The plaintiffs contend that UE's conduct with respect to the prospectus violated Rule 10b-5(b). It is the plaintiffs' position that the redemption provisions in the prospectus provide an absolute ban on lower cost refunding before March 1, 1985. The plaintiffs argue that these provisions misrepresent or omit material facts concerning the call protection and redemption rights set forth in the bond contract. The applicable provisions of the prospectus provide:

> use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> > (a) To employ any device, scheme, or artifice to defraud,
> > (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> > (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1985).

The New Bonds are redeemable, at the option of the Company, at the redemption prices set forth herein, provided that, prior to March 1, 1985, the Company may not redeem any of the New Bonds (other than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate) from or in anticipation of funds borrowed having an interest cost to the Company of less than 10.60% per annum. (This provision is located on the cover page of the prospectus.)

Redemption Provision ..... Non-refundable, otherwise than through the Improvement Fund or by the application of certain moneys in the Maintenance Fund or otherwise in the trust estate, at a lower interest cost prior to March 1, 1985 (page 3 of the prospectus)

Redemption. The New Bonds are to be redeemable in whole or in part upon at least 30 days' notice, at the election of the Company, at the applicable Regular Redemption Prices set forth in the following table, expressed in each case in percentages of principal amount, and at a Special Redemption Price of 100% of their principal amount, together with interest accrued to the redemption date; provided, however, that the New Bonds may not be so redeemed at the Regular Redemption Prices prior to March 1, 1985 if moneys for such redemption are obtained by the Company, directly or indirectly, from or in anticipation of borrowings by or for the account of the Company at an effective interest cost (computed in accordance with generally accepted financial practice) of 10.60% or less per annum. Regular Redemption Prices apply to all redemptions except in the following cases to which the Special Redemption Price will apply: (a) redemptions for the Improvement Fund for the New Bonds, or (b) redemp-

tions by application of cash in the Maintenance Fund or from certain other moneys included in the trust estate. (page 28 of the prospectus)[5]

Improvement Fund. So long as any New Bonds are outstanding, the Company will, on or before April 15 in each year beginning with 1977, provide an annual Improvement Fund for the New Bonds in an amount equal to 1% of the greatest principal amount of New Bonds issued prior to January 1 of such year, less New Bonds retired by application of certain moneys included in the trust estate, which amount may either be paid in cash or satisfied (i) by delivery of New Bonds theretofore issued and outstanding, or (ii) by application thereto of 60% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use. Moneys paid into the Improvement Fund for the New Bonds are to be applied to the redemption of New Bonds. (March 1975 Supplementary Indenture, Art. IV.) Similar improvement funds are provided for Bonds of prior Series by the supplemental indentures under which such Bonds were issues, except that certain of such funds may be satisfied by application of 100% of the amount of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien which the Company elects so to use. (page 29 of the prospectus)

Maintenance Fund. So long as any New Bonds are outstanding, the Company is required, on or before April 15 in each year, to deposit with the Trustee an amount in cash equal to 15% of its Gross Operating Revenues for the

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[5] Following this provision, on page twenty-eight of the prospectus, is a list of the "Regular Redemption Prices" for each year from 1975 to 2004, expressed in a percentage of par. The prices begin at a premium of 110.50% in 1975, and decrease to 100%, or par, in the year 2004.

> preceding year (after certain deductions including expenditures for maintenance and repairs). Such deposit may be reduced by certain credits, including the amount of property retirements not in excess of property additions, any available balance of Net Bondable Value of Property Additions not subject to an Unfunded Prior Lien and the principal amount of Bonds retired (except out of trust estate moneys). Moneys paid into the Maintenance Fund may be added to any of the improvement funds for the New Bonds or Bonds of prior Series and applied to redemption of Bonds to which such improvement fund relates. (1941 Supplemental Indenture, Part IV, Sec. 5; March 1975 Supplemental Indenture Act, Art. IV, Sec. 5.) (page 29 of the prospectus)

The parties' arguments focus on the call-protection provision on the cover page of the prospectus. The plaintiffs interpret this provision as setting forth an absolute prohibition on lower cost refunding by UE. The plaintiffs contend that the parenthetical in that provision is an exception to the restriction on redeeming bonds before March 1, 1985. The plaintiffs argue that this exception does not apply, however, to the restriction that follows that parenthetical, the restriction on lower cost refunding. According to this interpretation, if UE wanted to call the bonds before March 1, 1985, it could not do so with funds borrowed at an interest rate of less than 10.60%, *even if* UE implemented the call through the Improvement or Maintenance Funds. UE argues, on the other hand, that the parenthetical is an exception to both the restriction on call that precedes the parenthetical, *and* the restriction that follows it. According to this interpretation, UE could not redeem the bonds before March 1, 1985 with funds borrowed at less than 10.60% *unless* UE did so through the Improvement or Maintenance Funds.

Although both the plaintiffs' and UE's interpretations of the cover-page provision are plausible, we do not limit our determination to this single provision. To the contrary, we consider

the prospectus in its entirety, as we assume the jury did, together with the intentions of the parties. When the cover-page provision is read together with the redemption provisions on pages three and twenty-eight, and with the Improvement and Maintenance Fund provisions on page twenty-nine, it is clear that the jury could have reasonably found that the prospectus is ambiguous and misleading in that it omits material facts concerning the call protection. This finding is supported by the testimony of the purchasers, underwriters, and UE officials, all expressing the mutual intent of the parties that the bonds would possess solid protection against call for ten years.

Article VIII, section 8 of the bond contract has been judicially construed by the Missouri Court of Appeals to authorize lower cost refunding at the special redemption prices. *Harris v. Union Electric Co.*, 622 S.W.2d at 251. The prospectus, however, does not mention Article VIII, section 8. The prospectus is misleading in that it does not adequately disclose the authorization set forth in section 8, while giving the impression that refunding the bonds at a lower rate of interest before March 1, 1985 is prohibited. The redemption provision on page twenty-eight of the prospectus prohibits lower cost refunding at the Regular Redemption Prices, and the bond contract allows such refunding at the Special Redemption price. This "protection" is a sham. The Regular Redemption Prices are premiums, but the Special Redemption Price is fixed at par. A restriction on lower cost refunding at a premium with no such restriction at par affords no meaningful protection against call. UE would never call the bonds at a premium if it could call them at the lower price of par. This renders the premium price list on page twenty-eight of the prospectus meaningless and misleading, since it represents prices that would never be paid. Finally, the prospectus is misleading in that it fails to disclose UE's right to directly call the bonds through the Maintenance Fund. The bond contract, however, has been judicially construed to provide UE with such a right. Yet, the Maintenance Fund provision on page twenty-nine of the prospectus indicates that funds

deposited in the Maintenance Fund may be used indirectly to redeem bonds by first transferring the money to the Improvement Fund. This distinction is important because had UE redeemed the bonds indirectly through the Maintenance Fund according to the provision on page twenty-nine, it could not have avoided paying the premium prices.[6] The jury reasonably could have found that the prospectus is misleading and ambiguous in that it omits material facts that would have adequately disclosed the call protection of the bonds.[7]

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[6] The "Special Redemption Price" of par only applies to redemptions in an amount equal to the required deposit — one percent of the outstanding issue. Therefore, had UE called the bonds according to the Maintenance Fund Provision, it would have been forced to pay a premium after the first $700,000 of the call. (See the testimony of Stewart Smith, a vice president and General Counsel of UE, Record Tr. 6-24.)

[7] Consequently, the prospectus, having been drafted by UE, should be interpreted and construed liberally in favor of the investors, and strictly against UE. *See Corso v. Creighton University*, 731 F.2d 529, 533 (8th Cir. 1984) (contract ambiguities must be construed against the drafting party); Restatement (Second) of Contracts § 206 (1981). *See generally A.W.G. Farms, Inc. v. FDIC*, 757 F.2d 720, 726 (8th Cir. 1985) ("[A] contract of insurance is to be construed liberally in favor of the insured and strictly as against the insurer."); *City of Carter Lake v. AETNA Casualty & Surety Co.*, 604 F.2d 1052, 1056 (8th Cir. 1979) (doubt or ambiguity construed strictly against insurer and liberally in favor of the insured). The rationale for this rule is that the drafter of the instrument is "more likely than the other party to have reason to know of uncertainties of meaning. Indeed, [the drafter] may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert." Restatement (Second) of Contracts § 206 comment a (1981). The evidence is inconsistent concerning this point. Although UE contends that none of its officials were aware of the possibility of calling the bonds in the manner in which it planned, Mr. Friel, a vice president and the controller at UE, testified that he was aware of such a possibility in 1975. Even if UE officials did not deliberately leave the meaning of the prospectus obscure, they were obviously aware of uncertainties, the meaning of

The testimony of several UE officials and sophisticated market analysts also supports a finding by the jury that the prospectus is misleading and omits material facts concerning the call protection. These experienced individuals believed that the prospectus prohibited UE from refunding the bonds at a lower interest rate for ten years. Mr. Welshans, UE's Vice President of Finance, testified that the thrust of the representation that UE was making in the prospectus to the members of the general public or whomever bought the bonds was that the company would not refund the bonds at a lower rate of interest for ten years. Record Tr. 3-89-90. Mr. Murray, the Corporate Secretary, and Mr. Smith, a vice president and General Counsel, both testified that UE intended to give protection against call for ten years. Mr. Fendrich, a vice president at Standard and Poor's Corporation testified that he could not understand how protection against lower cost refunding at a premium, but not at par, could be considered valid protection; he stated that this "protection" made "no sense." Finally, Mr. Calder, a vice president at Lehman Brothers, one of the underwriters for the Series 2005 Bonds and an expert in underwriting and investment banking, testified that the redemption provision on page twenty-eight of the prospectus accurately reflected his understanding that the bonds were nonrefundable at a lower interest cost for ten years. This testimony clearly indicates that these people interpreted the prospectus as prohibiting UE from refunding the Series 2005 Bonds for ten years at a lower rate of

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which were decided at a later date to suit UE's purposes. We are mindful that the rule of construction stated above "does not justify abandoning principles of normal interpretation where the [provision] is clear, or taking such a construction as would vary the true meaning of the [provision] and the intentions of the parties." *Johnson v. United Fire Insurance Co.*, 586 F.2d 1291, 1295 (8th Cir. 1978). When read together, however, the call-protection provisions are not clear, and construing them in favor of the investors is consistent with the testimony of all the parties indicating that it was their intention that the bonds would possess solid protection against call for ten years.

interest, which is contrary to UE's rights as construed in the bond contract. It is also clear from the testimony of the purchasers, as well as UE officials, that both parties intended that the bonds would possess solid call protection.

Based on the language of the prospectus, the testimony of the parties expressing their intentions, and the testimony of the market experts, we conclude that the plaintiffs produced sufficient evidence for the jury to have found that the prospectus is ambiguous and misleading in that it omitted material facts that would have adequately disclosed UE's right to call the bonds, in violation of Rule 10b-5(b). We also conclude that the evidence is sufficient for the jury to have found that these omissions were part of a larger scheme or course of business to defraud the bondholders. To knowingly implement a plan in 1978 to call bonds that were previously intended and marketed as having solid call protection until 1985, constitutes a course of business, or a device, scheme, or artifice that operates as a fraud on the bondholders in violation of Rule 10b-5(a) and (c). Therefore, UE's conduct falls within all three subparagraphs of Rule 10b-5.[8]

2. Causation

To satisfy the causation element, the plaintiffs were required to show "some causal nexus" between UE's conduct and the plaintiffs' loss. *St. Louis Union Trust Co.*, 562 F.2d at 1048.

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[8] UE argues that it cannot, as a matter of law, violate Rule 10b-5 because it was acting pursuant to a contractual right provided for in the bond contract as later construed by the Missouri Court of Appeals. In support of its position, UE cites *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 965 (1981) and *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 562 F.2d 1040 (8th Cir. 1977), *cert. denied*, 435 U.S. 925 (1978). UE's argument is unpersuasive. Unlike the situations in *Broad* and *St. Louis Union Trust Co.*, the parties' intentions in this case were contrary to the subsequently construed contractual right in question. It is undisputed that UE marketed the bonds as possessing solid call protection for ten years.

Causation is often analyzed in terms of materiality and reliance. *Id.* When the alleged fraudulent conduct consists of misrepresentations, the plaintiff is required to show that the fact was material and that he relied upon it in making his investment decision. *Id.* When the alleged fraudulent conduct involves primarily a failure to disclose, however, the plaintiff is not required to prove reliance. Instead, reliance is inferred from materiality; that is, the causation element is established if the facts that were withheld are material. *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 153-54 (1972). (In a case "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.") Several courts also distinguish between "transaction causation" and "loss causation," and require the plaintiff to establish both. *See Wilson v. Comtech Telecommunications Corp.,* 648 F.2d 88, 92 n.7 (2d Cir. 1981); *Huddleston v. Herman & MacLean,* 640 F.2d 534, 549 and n.24 (5th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 459 U.S. 375 (1983); *Schlick v. Penn-Dixie Cement Corp.,* 507 F.2d 374, 380 (2d Cir. 1974), *cert. denied,* 421 U.S. 976 (1975). Transaction causation is established when the plaintiff shows that the defendant's fraudulent conduct caused the plaintiff to engage in the transaction in question. *See Wilson,* 648 F.2d at 92 n.7; *Schlick,* 507 F.2d at 380. This is nothing more than "but for" causation, which is merely another way of describing reliance. Loss causation, on the other hand, is the nexus between the defendant's fraudulent conduct and the plaintiff's pecuniary loss. *Wilson,* 648 F.2d at 92 n.7; *Huddleston,* 640 F.2d at 549 n.24. We hold that despite which terms are used, the evidence is sufficient to sustain a finding by the jury that the causation element was established.

A fact is "material if it is substantially likely that a reasonable investor would consider the matter important in making an investment decision." *Austin v. Loftsgaarden,* 675 F.2d at 176 (citing *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438,

449 (1976)). Although UE concedes that call provisions in general are material, it argues that the plaintiffs failed to establish that a differently worded redemption provision in the prospectus would have caused the average bond purchaser to make a different investment decision. We disagree. The jury heard the testimony of various purchasers, as well as market experts who stated that had the prospectus accurately disclosed UE's right to call the bonds before March 1, 1985, UE would have been forced to offer the bonds at a lower price or at a higher yield. The jury is competent to make a materiality finding, *see id.* at 177, and we find no error in its determination in this case. Reliance is established when the plaintiff shows that he was induced to act differently than he otherwise would have in making his investment decision. *St. Louis Union Trust Co.*, 562 F.2d at 1048. Because the plaintiffs' complaint consists primarily of allegations of a failure to adequately disclose the call-protection rights, reliance in this case can be inferred from materiality. Therefore, whether this element is discussed in terms of reliance or transaction causation, it was established at trial.[9] In addition to reliance, or transaction causation, the plaintiffs were also required to prove loss causation. This issue obviously overlaps with the issue of damages, and we will address it accordingly.

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[9] UE also contends that the evidence is insufficient to establish reliance by those bondholders who held bonds on April 11, 1978, but who did not purchase them in 1975. UE argues that these bondholders did not rely on the alleged omissions of material fact by UE in 1975. We disagree. False or misleading information, such as that involved in this case, can actually harm investors directly — through actual reliance, or indirectly — by affecting the market upon which the investor relied and traded. *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 69 (8th Cir. 1980) (court held that the plaintiffs were not damaged as a result of the defendants' conduct because they neither relied nor traded), *cert. denied*, 449 U.S. 1079 (1981). The plaintiffs established that UE's misleading prospectus inflated the price of the bonds on the open market, which these later purchasers relied upon in making their investment decision. *See Lipton v. Documation, Inc.*, 734 F.2d 740, 748 (11th Cir. 1984) (adopting a fraud on the market theory of recovery), *cert. denied*, 105 S.Ct. 814 (1985).

3. Damages

In securities fraud cases, damages are determined in accordance with the extent to which a plaintiff is actually damaged as a result of the defendant's fraudulent conduct. *Austin*, 675 F.2d at 180. Actual damages are generally measured by determining the plaintiff's out-of-pocket loss, which is in turn measured by the difference between the purchase price of the security and its actual value. *Id.* (citing *Harris v. American Investment Co.*, 523 F.2d 220, 225 (8th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976)). In *Harris v. American Investment Co.*, the court recognized that the actual value of the security may be determined either on the date of purchase or on the date the fraud was discovered. 523 F.2d at 225-27. The court acknowledged that in some cases, especially when the security is traded publicly, it may be difficult to ascertain the value of the security transferred in connection with the fraudulent conduct and in such cases the value may be determined on the date the fraud is discovered. *Id.* at 226. In any event, "the function of the court 'is to fashion the remedy best suited to the harm.' " *Austin*, 675 F.2d at 181 (quoting *Garnatz v. Stifel, Nicolaus & Co.*, 559 F.2d 1357, 1360 (8th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978)). UE argues that the proper measure of damages is the difference between the purchase price of the bonds and the value of the bonds once the alleged fraud was discovered, which was on the day the plan to call the bonds was announced. UE contends that the evidence is insufficient to establish damages. Although the price of the bonds dropped twelve points from approximately 113 to 101, or $120 per bond, on the day the plan was announced, UE argues that because the named plaintiffs purchased the bonds for less than 101, they did not incur a loss as a result of UE's conduct. We disagree.

The proper measure of damages in this case is the difference between the purchase price and the actual value of the bonds on the date they were issued. This remedy is best suited to the harm in this case because it represents the reduction in the value of the bonds caused by the lack of call protection. Although the plain-

tiffs purchased the bonds for less than 101, the bonds were worth much less because the call protection that the plaintiffs thought they were purchasing did not exist. The plaintiffs paid more for the bonds than they were actually worth. This is not one of those cases recognized by the court in *Harris v. American Investment Co.* in which the value of the security should be determined on the date the fraud was discovered because its true value on the date it was purchased is too difficult to ascertain. To the contrary, we believe that the true value of the bonds on the date they were issued is reflected by the *drop* in the market price once the fraud was discovered. We agree with the plaintiffs that the reduction in market value fairly represents the reduction in the initial purchase price of the bonds that would have been necessary in order to sell them at 10½% without the call protection. The plaintiffs introduced ample evidence demonstrating that if UE had issued the bonds without the ten-year-call protection, the plaintiffs would have either paid a substantially lower price for the bonds or demanded a higher coupon rate. The evidence indicated that "at least two major underwriters," Merrill Lynch and Halsey Stuart, advised UE that it would cost the company several basis points if the bonds were issued without the call protection. This evidence was supported by the testimony of UE officials and market analysts that the bonds could not have been sold for par and at 10½% without the ten-year-call protection. (See, for example, the testimony of Mr. Welshans, Record Tr. 3-63-73.) We conclude, therefore, that the jury could reasonably find on the basis of these facts that UE's conduct in announcing its plan to call the bonds, which rendered the representations in the prospectus misleading, caused the plaintiffs' damages. Further, we hold that the damages are best measured by the difference between the purchase price of the bonds and their true value on the date purchased.[10]

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[10] UE also urges that because the plan was cancelled, the plaintiffs were not damaged, and therefore they lacked standing to sue. We

4. In connection with.

Section 10(b) and Rule 10b-5 proscribe fraudulent conduct "in connection with the purchase or sale of any security." 15 U.S.C. § 78j (1982); 17 C.F.R. § 240.10b-5 (1985). Plaintiffs must show that the fraudulent conduct "touches" the purchase or sale of the securities. *See Superintendent of Insurance v. Bankers Life & Casualty Col,* 404 U.S. 6, 12-13 (1971). It is undisputed in this case that the named plaintiffs purchased their bonds in connection with UE's fraudulent conduct. UE argues, however, that the other members of the class who held bonds on April 11, 1978 did not purchase their bonds in connection with the alleged omissions of material fact in the prospectus. Although the *Bankers Life* Court did not explain what constitutes "touching" a security transaction, we believe that UE's fraudulent conduct "touches" the class members' purchases of their bonds. The market price of the bonds reflected the misleading call protection. If the call protection had been accurately disclosed before these members of the class purchased their bonds, they would have paid less for the bonds or demanded a higher yield. Clearly, these members of the class purchased their bonds in connection with UE's fraudulent conduct.[11]

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disagree. As a result of UE's fraudulent scheme or course of business, the plaintiffs paid for call protection that they in fact did not receive. Consequently, the plaintiffs were injured, and have standing to sue.

[11] UE also argues that, with the exception of the named plaintiffs, the evidence did not establish that each member of the class was a purchaser of the bonds. The Supreme Court has ruled that only purchasers or sellers of securities may maintain a private cause of action for money damages pursuant to Rule 10b-5. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975). The Court stated that the virtue of its ruling "is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates." *Id.* at 747. *See Vervaecke v. Chiles, Heider & Co.,* 578 F.2d 713, 719 (8th Cir. 1978). We believe that the members of the class who held the bonds on April 11, 1978 dealt in the security to which the omissions concerning the call protection relate.

Finally, the plaintiffs were required to prove scienter, that is, that UE engaged in the fraudulent conduct with an intent to deceive, manipulate, or defraud the bondholders. *See Hochfelder,* 425 U.S. at 193. UE argues that the plaintiffs failed to establish scienter at the time the prospectus was issued in 1975. Several UE officials testified that in 1975 they were unaware of the possibility of refunding the bonds in any fashion before March 1, 1985. UE argues that because the alleged omissions of material fact in the prospectus were not made with scienter, the plaintiffs cannot recover. We disagree. We have stated that the evidence is sufficient for the jury to have found that UE's activities between March of 1975 and June of 1978 constituted a scheme or course of business that operated as a fraud upon the bondholders. Although UE officials had no intent to defraud when they represented that the bonds possessed ten-year-call protection, they certainly intended to defraud the bondholders of this protection when they announced the plan to call the bonds before the ten-year period had run. There is substantial evidence demonstrating that UE knew that the plan was contrary to its representation in the prospectus concerning the call protection. Several UE officials testified that the company, without a doubt, initially intended to provide "solid protection" against call for ten years. The evidence indicated that Mr. Grainger, one of UE's Advisory Directors, vehemently opposed the plan as "subordinating moral responsibility for financial gain," and cautioned UE's president that the "contract with the Bondholders should be kept inviolate." UE's Vice President of Finance, Mr. Welshans, testified that the company was well aware that the plan was contrary to the protection that the underwriters, the bondholders, and Union Electric all mutually intended the bonds to possess. The evidence also indicated that UE only hesitated long enough to assure itself that it could re-enter the bond market at a later date without any trouble. Once UE observed that FP & L's plan did not adversely affect its ability to re-enter the market, UE implemented its plan. UE's conduct in this case certainly is inconsistent with the

fundamental purpose of the Securities Exchange Act, which is " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.' " *Affiliated Ute Citizens,* 406 U.S. at 151 (quoting *SEC v. Capital Gains Research Bureau,* 375 U.S. 180, 186 (1963)). We believe that the plan to call the bonds in these circumstances is within the range of ingenious devices used to manipulate securities that Congress intended to prohibit. Clearly, the evidence is sufficient from which the jury could have found that UE acted with the intent to defraud the bondholders.[12]

UE relies heavily on *Lucas v. Florida Power & Light Co.,* 765 F.2d 1039 (11th Cir. 1985) in support of its position that it did not violate section 10(b) and Rule 10b-5. In *Lucas,* the plain-

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[12] The district court instructed the jury that reckless behavior would constitute scienter. Instruction No. 18A. Although the Supreme Court has explicitly left open the question whether reckless behavior satisfies the scienter requirement, *Hochfelder,* 425 U.S. at 193-94 n. 12, this instruction reflects the prevailing view of the courts of appeals. *See, e.g., Woods v. Barnett Bank,* 765 F.2d 1004, 1010 (11th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos,* 762 F.2d 522, 528 (7th Cir. 1985); *Burgess v. Premier Corp.,* 727 F.2d 826, 832 (9th Cir. 1984); *Broad v. Rockwell International Corp.,* 642 F.2d 929, 961 (5th Cir.) (en banc), *cert. denied,* 454 U.S. 965 (1981). In *Stokes v. Lokken,* 644 F.2d 779 (8th Cir. 1981), the court addressed this issue in the context of aiding and abetting violations of section 10(b) and Rule 10b-5. The court, without defining a comprehensive standard, held that the defendant's "conduct [fell] short of any reasonable formulation of the requisite legal standard" for recklessness. *Id.* at 783. Although we do not address the issue of recklessness since we hold that sufficient evidence exists from which the jury could have found that UE intentionally defrauded the bondholders of the call protection, we believe that the converse of *Stokes* is true in this case. Here, UE's conduct surpasses any reasonable formulation of the requisite legal standard for recklessness. It was UE's intent that the bonds would possess solid protection against call for ten years. To represent and market the bonds as possessing such protection, and then implement a plan to call the bonds within the ten-year period, constitutes at the very least recklessness on UE's part.

tiffs, FP & L bondholders, instituted a class action suit against FP & L, alleging securities fraud as a result of FP & L's *redemption* "of approximately half of the outstanding 10 1/8 bonds at the special redemption price," within five years after the bonds were purchased. *Id.* at 1041. The plaintiffs claimed that the prospectus indicated that the bonds were nonredeemable for five years. The Eleventh Circuit affirmed the district court's determination that the prospectus did not misrepresent or omit material facts concerning the redeemability of the bonds. *Id.* at 1045. *Lucas,* unlike the instant case, involved a redemption — not a refund — of the bonds. *Id.* at 1041 n. 7. Further, FP & L's prospectus clearly indicated that the five-year-call protection applied to *lower cost refunding,* but *not* to *redemptions. Id.* at 1041. Moreover, UE officials, unlike FP & L officials, *intended* and *represented* that the bonds would possess solid protection against call of any kind for the limited time period. UE's reliance on *Lucas* is misplaced.

During oral argument, UE urged the court to consider the holding in *Feldbaum v. Avon Products, Inc.,* 741 F.2d 234 (8th Cir. 1984). There, the plaintiff claimed that a "lock-up option," granted in connection with a tender offer, was a manipulative practice or device in violation of section 10(b), Rule 10b-5, and the Williams Act, which added several sections to the Securities Exchange Act, including section 14(e). *Id.* at 237. The court recognized that the plaintiff did "not allege that material information about the option was withheld or distorted." *Id.* The court affirmed the district court's dismissal of the complaint for failure to state a claim for relief because the option was not a manipulative practice or device. The court held that, in light of the full-disclosure purpose of the Williams Act, some element of deception or misrepresentation is essential to a valid section 14(e) claim. *Id.* The court noted that its discussion of 14(e) applied to an allegation of a violation of 10(b) and 10b-5. *Id.* at n. 8. UE apparently finds support in the *Feldbaum* court's discussion and holding for its proposition that the transaction-fraud theory of recovery asserted by the

plaintiffs is no longer viable. UE argues that therefore the plaintiffs cannot, as a matter of law, recover on that theory.

UE's argument is unpersuasive for two reasons. First, UE's reasoning is accurate only to the extent that any theory of recovery pursuant to section 10(b) and Rule 10b-5, whatever terminology is used to describe it, is not viable *unless* the plaintiff alleges and proves "intentional or willful conduct designed to deceive or defraud investors." *Hochfelder*, 425 U.S. at 199 (describing the term "manipulative" in the context of 10(b) liability). This is the type of conduct that the *Feldbaum* court was referring to when it held that an allegation of deception or misrepresentation is an essential requirement. The plaintiffs in this case clearly made such an allegation in their "First Amended Complaint" at paragraph twenty-one, and in their "Amendment to First Amended Complaint" at paragraph thirty-one. Further, the plaintiffs' proof at trial was consistent with these allegations. Second, and more importantly, we decline to distinguish between disclosure fraud and transaction fraud in this case when describing UE's conduct. As we stated above, we view UE's entire conduct from March, 1975 to April, 1978 as a course of business and a scheme or artifice to defraud the investors, which includes the misleading call-protection provisions in the prospectus.

In sum, we hold that the verdicts are supported by substantial evidence in the record. The plaintiffs introduced sufficient evidence from which the jury could have found that the parties mutually intended that the bonds would possess solid protection against call for ten years, that this protection was material and affected the price of the bonds, and that it was relied upon by the plaintiffs. The evidence also supported a finding by the jury the UE intended to defraud the investors of this protection when it announced its plan to call the bonds in 1978, causing the market value of the bonds to drop. Finally, the evidence showed that as a result of UE's fraudulent conduct between March, 1975 and April, 1978, the value of the bonds purchased by the

plaintiffs was less than the price they paid, which was reflected by the market drop once the investors discovered the fraud. Consequently, UE's conduct violated all three sub-paragraphs of Rule 10b-5. Therefore, we will not disturb the jury's verdicts on the plaintiffs' section 10(b) and Rule 10b-5 claims.

C. Instructions

UE contends that the court erroneously instructed the jury with respect to both liability and damages. The instructions reflect the bifurcated nature of the trial. In the liability portion of the trial, the jury was instructed not to be concerned with ascertaining a specific dollar amount of damages. Instead, the court instructed the jury "to determine in a general sense, whether or not the plaintiffs have sustained some damage."

UE argues that the instructions failed to require a finding by the jury that the plaintiffs suffered a causally related loss. UE's argument is without merit. When a portion of the jury instructions are challenged, we must look to the instructions as a whole. *Simpson v. Norwesco, Inc.*, 583 F.2d 1007, 1013 (8th Cir. 1978). The instructions clearly informed the jury that to find liability, it must determine that the plaintiffs suffered a loss. The specific dollar amount was determined in the damage portion of the trial. The court did not erroneously instruct the jury.

With respect to damages, UE argues that the court erroneously instructed the jury on the proper measure of damages. We thoroughly addressed this issue in our discussion above, and concluded that the damage measurement was proper. UE also argues that the jury should have been instructed to reduce the amount of damages by the value of any benefits received by the bondholders as a result of their investment. This argument is also without merit. In support of its position, UE relies on *Austin*, 675 F.2d at 181. In *Austin*, the court held that when rescissional or restitutional damages are awarded instead of the

traditional out-of-pocket damages, the award should be reduced by any value received as a result of the fraudulent transaction. *Id.* The *Austin* court specifically limited its holding, however, "to cases involving investments that are expressly marketed and sold as tax shelters." *Id.* at 183; *see Austin v. Loftsgaarden,* 768 F.2d 949, 953 n. 5 (8th Cir.) (en banc), *cert. granted, sub nom., Randall v. Loftsgaarden,* 106 S. Ct. 379 (1985). In this case, the plaintiffs were not awarded rescissional or restitutional damages, and the bonds were not marketed and sold as tax shelters. Consequently, we hold that the court properly refused to instruct the jury to reduce the award by the value of any benefits received by the plaintiffs.

D. Exclusion of Evidence

Finally, UE contends that the court erred in excluding all evidence concerning the market value of the bonds after the plan was cancelled. Specifically, UE argues that the court should have allowed its witness to testify that the market value of the bonds merely dropped as a result of UE's announcement of the plan, and that when the plan was cancelled, the bonds recovered. UE argues that because the bonds recovered, the plaintiffs did not suffer a loss. UE also argues that the court erroneously excluded evidence of the plaintiffs' continued receipt of interest payments.

The district court has broad discretion concerning the admissibility of evidence, and we will disturb the court's ruling only upon a clear showing of an abuse of that discretion. *Smith v. Firestone Tire & Rubber Co.,* 755 F.2d 129, 134 (8th Cir. 1985). By continuing to hold the securities after the discovery of the fraud, the investor "has, in effect, made a second investment decision unrelated to his initial decision to purchase the [securities]." *Harris v. American Investment Co.,* 523 F.2d at 228. The *Harris* court noted that whatever happens after this second investment decision has no bearing on the measure of the investor's damages. *Id.* Although the court was responding to

the argument that the investor should have mitigated his damages by selling his stock after discovering the fraud, we believe that the same principle applies in this case. *See Nye v. Blyth Eastman Dillon & Co.*, 588 F.2d 1189, 1198 (8th Cir. 1978). The bondholders made a second investment decision when they decided to hold the bonds after the plan was announced and the market value of the bonds had plunged. The recovery of the bonds two months later, and the continued receipt of interest payments have no bearing on the measure of the plaintiffs' damages caused by UE's fraudulent conduct. Therefore, we hold that the district court did not abuse its discretion in excluding the proffered evidence.

III. Conclusion

In conclusion, we hold that the plaintiffs' cause of action was not barred by the statute of limitations, the evidence is sufficient to sustain the jury's verdicts on the section 10(b) and Rule 10b-5 claims, and the court did not err in instructing the jury or in excluding UE's proffered evidence. Therefore, we affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.